Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

FLEXIBLE PRODUCTS COMPANY, RANDY PETERSON, DOUG CRUICKSHANK, PETITIONERS

v.

ROGER ERVAST

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the ERISA complete preemption doctrine apply to claims for increased ERISA benefits by a participant who alleges that he or she is a "stockholder" by virtue of stock held by an ERISA plan, and thus owed state law disclosure duties?

2. Is a claim for increased benefits under an ERISA plan "within the scope" of ERISA § 502(a) and thus completely preempted if:

   (a) the plaintiff's theory does not purport to be based on the terms of the plan;

   (b) the plaintiff chooses to assert a state law cause of action that is not "akin" to any claim available under § 502(a); or

   (c) the plaintiff is pursuing remedies under state law that are not provided for under ERISA § 502(a)?

3. Does ERISA impose an affirmative fiduciary disclosure duty?

CORPORATE DISCLOSURE STATEMENT

Flexible Products Company is a wholly owned subsidiary of The Dow Chemical Company. There are no publicly held companies owning 10% or more of Dow.

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OPINIONS BELOW

The opinion of the Court of Appeals (*See* Appendix, *infra* at 1a) is recorded at 346 F.3d 1007. The order denying the petition for rehearing and suggestion for rehearing *en banc* (*Id.* at 44a) is unreported. The opinions of the United States District Court for the Northern District of Georgia, Atlanta Division (*Id.* at 22a and38a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 2003. A petition for rehearing and suggestion for rehearing *en banc* was denied on December 11, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The primary statute involved is § 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. § 1132(a)), which is fully set forth in the Appendix attached hereto.

STATEMENT

Procedural Background

This case was initially filed by Roger Ervast ("Ervast") in the State Court of Fulton County, Georgia. Petitioner timely removed pursuant to 28 U.S.C. §§ 1441 and 1446 on the grounds that Plaintiff Roger Ervast's claim for a larger distribution from Flexible's Employee Stock Ownership Plan ("ESOP") is

completely preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered summary judgment in Defendants' favor on September 25, 2002. Plaintiff appealed the final order pursuant to 28 U.S.C. § 1291 on October 16, 2002. A Panel of the Eleventh Circuit reversed the district court's conclusion that Ervast's claim is subject to complete preemption and instructed the district court to remand the case to state court. *See Ervast v. Flexible Products Co.*, 346 F.3d 1007 (11th Cir. 2003) (the "Panel Opinion").

Statement of Facts

Ervast is a former employee of Flexible Products Company ("Flexible") who resigned. (Complaint, R1-1.) At the time of his resignation, Ervast was a participant in an ERISA-governed Employee Stock Ownership Plan (the "ESOP") that held Flexible stock in trust for the benefit of participants like Ervast.[1] The crux of Ervast's Complaint is that when he submitted his resignation, he was not informed that The Dow Chemical Company ("Dow") had expressed interest in discussing a potential acquisition of Flexible.

Dow eventually acquired Flexible for a share price higher than the price upon which Ervast's ESOP distribution was based. (Complaint, R1-1.) He

[1] As the Panel Opinion correctly notes, Ervast owned some shares pursuant to an Option Plan; however, those shares are not relevant to the jurisdictional issue upon which the Panel ruled. *Ervast*, 346 F.3d at 1009 n. 1 (16a).

contends Defendants owed a fiduciary duty to him under Georgia law as a "shareholder" to disclose the Dow overture when he resigned.

However, it is undisputed that Ervast never acquired any stock as a result of his participation in the ESOP. Rather, Flexible made contributions to a trust, which invested primarily in Flexible stock and held such assets for the benefit of participants. (R5-57, Exhibit 13, p. 12.) The ESOP trustee then established and maintained a separate account for each participant. (*Id.*, p. 13.) The Plan provides that: "Such separate accounts shall not require a segregation of the Trust assets and no Participant shall acquire any right to or interest in any specific asset of the Trust as a result of the allocations provided for in the Plan." (*Id.*, p. 13.)

The ESOP provides that upon the termination of a participant's employment he or she becomes entitled to a distribution. (R5-57, Exhibit 13, p. 25.) Because Flexible's stock was not publicly traded, the ESOP was required to provide Participants with a "put option" that allowed them to require the Trust, or the Company, to purchase the shares allocated to their accounts. (*Id.*, p. 27; *see also* 26 U.S.C. § 409(h)(1)(B), 29 C.F.R. § 2550.408b-3(j)). The price paid for such stock was determined by the most recent annual valuation. (*Id.*, p. 14.)

Ervast requested that his put option be exercised immediately following his termination. (R5-57, Exhibit 15.) He completed a Notice of Withholding on Qualified Total Distributions, electing to have his ESOP distribution made as a tax-deferred rollover to his IRA. (*Id.*, Exhibit 16.) Ervast's distribution was made in cash as a direct trust-to-trust transfer to his rollover IRA. (R5-57, Exhibit 19.) He did <u>not</u> (at any time) receive a distribution in company stock. (*Id.*)

Nevertheless, Ervast alleges that he was a "shareholder" by virtue of his participation in the ESOP, and thus Defendants owed him a fiduciary duty to disclose the Dow overture under state law prior to his exercise of the put option under the ESOP.

REASONS FOR GRANTING THE WRIT

I. This petition presents the important federal question of whether plan sponsors who establish ERISA plans are subject to state law duties owned to "shareholders" by virtue of stock held by the plan.

The most important fact in this case is that Ervast never owned any of the ESOP shares allocated to his account outside of the ESOP. As a result, the only interest that Mr. Ervast had in these shares was in his capacity as an ESOP participant. And the ESOP Plan documents are clear that participants do not acquire any right or interest in Plan assets. (R5-57, Exhibit 13, p. 12.)

This would be a completely different case if Ervast had ever held an interest in this stock apart from his participation in the ESOP. State law disclosure requirements might arguably attach at that point without conflicting with ERISA. However, because Ervast only had an interest in this stock by virtue of his participation in the ESOP, allowing him to go forward with state law claims in order to obtain more money for his ESOP interest would clearly conflict with ERISA.

Further, it is clear that the relief Ervast is seeking is, in fact, a larger distribution of ERISA benefits. The Complaint alleges that Defendants are

liable because they failed "to disclose material information that would have affected Plaintiff's decision to resign and therefore exercise his ... ESOP rights." (R1-1, ¶ 19.) Ervast asserts that, as a result of this failure to disclose, the price he received "for his interest in the ... ESOP was less than the value of the ... ESOP in light of the Dow negotiations and subsequent purchase." (*Id.*, ¶ 15.) Just as the original amount paid to Ervast's IRA – calculated by multiplying the number of his ESOP shares times the annual valuation price – constituted a tax-deferred distribution of benefits, so to would the higher amount Ervast claims he should have received – calculated by multiply such shares times the share price paid by Dow – constitute a distribution of ESOP benefits. Although the price per share would be different, both sums are based on the number of ESOP shares allocated to Ervast and represent a calculation of his ESOP benefits.

Allowing ESOP participants to dispute the amount of their ESOP distributions under state law theories would supplement the remedies provided by Congress in ERISA § 502(a). Further, treating ESOP participants as "shareholders" under state law by virtue of stock held in trust by the ESOP would result in inconsistent plan administration and discourage employers from offering ESOPs. Each of these factors weighs heavily in favor of applying the complete preemption doctrine when ESOP participants seek larger ESOP distributions under state law shareholder theories.

As this Court has noted on more than one occasion, state law remedies cannot supplement ERISA's exclusive civil remedies provision because:

> The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Metropolitan Life Insurance Company v. Taylor, 481 S.C. 58, 107 S. Ct. 1542, 94 L.Ed. 2d 55 (1987) (quoting *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 54, 107 S. Ct. 1549, 1556, 95 L.Ed.2d 39 (1987)). For this reason, the Court held in *Taylor* held that state law claims that would supplement ERISA's exclusive remedies are completely preempted, and thus subject to removal even though pled only under state law.

Nevertheless, the Panel Opinion permits ESOP participants to sue for larger ESOP distributions under state law – clearly adding a supplemental remedy to those provided by ERISA. This result is especially troubling because the Sixth Circuit has also recently reached a similar, although not identical, conclusion. *Husvar v. Rapoport*, 337 F.3d 603 (6th Cir. 2003).[2] The fact that two federal circuits have recently permitted ESOP participants to pursue supplemental state law remedies to obtain additional ESOP benefits heightens

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[2] Candidly, *Husvar* is distinguishable because here Ervast contends that the information not disclosed impacted the timing of his decision to exercise his put option under the ESOP, thus providing a clear nexus between the allegedly tortuous act and the Plan. Apparently such a nexus was lacking in *Husvar*. Nevertheless, the point here is that two circuits have declined to apply the complete preemption doctrine to state law claims by ESOP participants seeking increased ESOP benefits as alleged state law shareholders.

the need for Supreme Court review of this important federal question.

This Court has also noted that one of ERISA's primary goals is to provide for national uniformity in plan administration. *Ingersoll-Rand Co. v. McClendon*, 489 U.S. 133, 142 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). If an employer that offers an ESOP is subject to state law disclosure duties because the participants are deemed to be shareholders, plan sponsors, administrators and fiduciaries will have to tailor their disclosures to the law of each state in which participants are employed. Some states may not consider beneficial owners of shares held in trust as shareholders subject to disclosure requirements. Further, each state will likely have its own unique disclosure standards, and there would certainly be considerable variation in other duties owed to shareholders. Subjecting ERISA plan sponsors, administrators and fiduciaries to such varying state standards on a national basis is an issue of critical importance to employers offering such plans that deserves Supreme Court scrutiny.

Moreover, subjecting plan sponsors to varying state duties owed to shareholders provides a powerful disincentive for employers to sponsor ESOPs in the first place. This is particularly true if employers cannot sponsor such plans without having to disclose sensitive corporate information (like merger discussions) to all employees who participate in the plan. In passing the Tax Reform Act of 1976, Congress explicitly stated its concern that courts should refrain from erecting barriers that would interfere with the goal of promoting employee stock ownership through ERISA plans:

> The Congress is deeply concerned that the objectives sought by [the laws encouraging ESOPs] will be made unattainable by regulations and rulings which treat employee stock ownership plans as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.

Tax Reform Act of 1976, Pub.L. No. 94-455, § 803(h), 90 Stat. 1590 (1976). In keeping with Congress's concern that judicial rulings not create barriers to the establishment of ESOPs, the Court should grant certiorari to determine whether state law claims for larger ESOP distributions based on alleged state "shareholder" rights are completely preempted.

II. The Court should grant this petition to resolve a circuit split as to the proper test for determining when a claim falls "within the scope" of ERISA § 502(a) for purposes of the complete preemption doctrine.

This Court has held that Congress intended to completely preempt state law claims that fall "within the scope" of ERISA § 502(a). *Taylor*, 481 U.S. at 64. In *Taylor*, the plaintiff had been denied disability benefits under an ERISA plan. The plaintiff filed suit in state court seeking, among other things, "compensation for mental anguish" caused by the benefit denial, and damages for "wrongful termination of his employment and for wrongfully failing to promote him in retaliation" for a prior Worker's Compensation

claim. *Taylor*, 481 U.S. at 61. This Court noted that under the well-pleaded complaint rule, such a claim would ordinarily not be removable because a federal question does not appear on the face of the complaint; however, this Court also recognized that Congress intended to completely preempt state claims law falling within the scope of ERISA § 502(a) so that such claims are necessarily federal in character and thus removable even though based entirely on state law.

Since *Taylor*, the circuit courts have adopted varying standards for determining when a state law claim falls "within the scope" of ERISA § 502(a). For example, the Panel Opinion in this case applied the complete preemption test articulated by the Eleventh Circuit in *Butero v. Royal Maccabees Life Insurance Company*, 174 F.3d 1207, 1212 (11th Cir. 1999). In *Butero*, the Eleventh Circuit held that claims subject to ERISA preemption may be removed, irrespective of how the complaint is pled, if: (1) there is a relevant ERISA plan; (2) the plaintiff has standing to sue under the plan; (3) the defendant is an ERISA entity; and (4) the complaint seeks compensatory relief akin to that available under ERISA § 502(a) (29 U.S.C. § 1132(a)). *Id.*[3] The Seventh Circuit has adopted a similar standard. *See e.g., Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1487 (7th Cir. 1996). Other circuits have adopted a more straightforward application of *Taylor*, finding that any state cause of action that "conflicts" with ERISA under § 514 and acts as an alternative means of vindicating the rights

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[3] Ervast conceded the third factor, but disputed the first, second and fourth factors. (Brief in Support of Plaintiff's Motion to Remand, R2-29, p. 16.) The Panel found that Ervast's ESOP claim does not seek relief "akin" to that available under § 1132(a).

protected by § 502(a) is "within the scope" of that section even if the suit is not a cognizable or winning claim under § 502(a). *See e.g., Cicio v. Does*, 321 F.3d 83, 94 (2nd Cir. 2003).[4]

These varying standards result in dramatically different applications of *Taylor*. For example, the Seventh Circuit test limits the complete preemption doctrine to state law claims that are based on the terms of the plan. *Jass*, 88 F.3d at 1487 (only claims that require interpretation of an ERISA plan are subject to complete preemption). The Panel Opinion in this case imposed the same restriction, although it is not formally part of the *Butero* test. *Ervast*, 346 F.3d at 1015 (Ervast's claim not completely preempted because not based on plan terms) (13a). In contrast, as discussed below, other circuits have applied *Taylor* to state law claims that are not expressly based on the terms of the plan. The Panel Opinion also restricts the scope of the complete preemption doctrine to state law claims that are analogous to claims available under § 502(a), which is contrary to the view of other circuits and in conflict with a proper construction of *Taylor*. Further, the Panel found that it would be inconsistent to apply the complete preemption doctrine when to do so would leave the plaintiff without a remedy. *Ervast*, 346 F.3d at 1015 n. 8 (19a). This view is also contrary to the holdings of other circuits. As discussed below, the Court should grant certiorari to resolve these conflicts

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[4] Some circuits have made the complete preemption test even more clear-cut by eliminating the "conflict preemption" prong of the analysis. See e.g. *Arana v. Ochsner Health Plan*, 338 F.3d 433, 440 (5th Cir. 2003) ("Put simply, there is complete preemption jurisdiction over a claim that seeks relief 'within the scope of the civil enforcement provisions of § 502(a).' ") (*citing Taylor*, 481 U.S. at 66.)

and thus clarify the contours of the complete preemption doctrine.

A. The Court should grant this petition to determine whether the complete preemption doctrine is limited to claims that are expressly based on the terms of an ERISA plan.

The lynchpin of the Panel Opinion is the conclusion that Ervast's claims are not completely preempted because they are not based on the terms of the plan. In this regard, the Opinion states:

> "Ervast does not contend that the valuation for the shares he received under the ESOP was improper under the terms of the ERISA plan. Rather, he hinges defendants' liability on a failure to communicate material information to which he allegedly was entitled as a shareholder and affected his individual decision to resign and cash out his participant account of shares under the ESOP."

Ervast, 346 F.3d at 1015 (11-12a). The Panel Opinion summarizes its holding by stating that the complete preemption doctrine was inapplicable "because the claim that Ervast brought against the defendants is not an ERISA civil action for the recovery of benefits due under the terms of the plan, but grounded in state law." *Id.* at 1016

This conclusion is contrary to this Court's decision in *Taylor* and causes a circuit split on this question. In *Taylor*, the plaintiff sought damages for mental anguish and wrongful termination that clearly

were not based on the terms of the plan. *Taylor*, 481 U.S. at 61. Nevertheless, this Court held that ERISA completely preempted these claims. *Id.* at 67. Further the *Taylor* rationale – fidelity to congressional intent to make ERISA remedies exclusive – is not limited to claims expressly based on the terms of an ERISA plan.

A number of other circuits have recognized that the complete preemption doctrine is not limited to claims based on the terms of the ERISA plan. *See, e.g., Wood v. Prudential Ins. Co.*, 207 F.3d 674, 678 (3rd Cir. 2000) (retaliatory discharge claim completely preempted although not based on terms of plan); *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999) (state law breach of fiduciary duty claim based on wrongful removal of stock from an ERISA participant's account completely preempted); *Felton v. The Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991) (wrongful discharge and civil rights claims completely preempted). In contrast, under the Seventh Circuit's approach only claims that cannot be resolved without an interpretation of the ERISA plan are completely preempted. *Jass*, 88 F.3d at 1487. The Court should grant certiorari to resolve the important federal question of whether ERISA complete preemption applies to claims not based on plan terms, and resolve the circuit split on this question.

B. The Court should grant this petition to determine whether complete preemption is limited to claims that fall within the scope of § 502(a)(1)(B).

The Panel Opinion also assumes that the complete preemption doctrine is limited to claims within the scope of § 502(a)(1)(B). Indeed, although

Defendants argued that Plaintiff's claim was analogous to an ERISA § 502(a)(3) claim for breach of fiduciary duty, and the district court analyzed Plaintiff's claim under § 502(a)(3), the Panel Opinion strictly limits its analysis to § 502(a)(1)(B) – failing to even address whether Plaintiff's claim is "akin" to any other claims under § 502(a). *See, Ervast*, 346 F.3d at 1015-16 (12-13a).

Other than the Eleventh Circuit, no other circuit has expressly limited the complete preemption doctrine to claims within the scope of ERISA § 502(a)(1)(B). Some circuits, however, have indicated that it is an open question whether the complete preemption doctrine applies outside the § 502(a)(1)(B) context. *See e.g., Giles v. Nylcare Health Plans, Inc.*, 172 F.3d 332, 336 n. 6 (5th Cir. 1999) (*citing McClelland v. Gronwaldt*, 155 F.3d 507, 517 n. 34 (5th Cir. 1998) (overturned on other grounds)). In contrast, the majority of circuits have applied *Taylor* to claims that fall within the scope of ERISA § 502(a)(3). *See e.g., Joyce v. RJR Nabisco Holdings Corp.*, 126 F.3d 166, 171 n.3 (3rd Cir. 1997) (collecting cases).

In addition to being contrary to the majority view, the Panel Opinion in this regard is apparently at odds with *Taylor* itself. Although the particular claims at issue in *Taylor* fell within the scope of § 502(a)(1)(B), the Court's language applies broadly to all of § 502(a). *Taylor*, 481 U.S. at 66 ("Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of § 502(a) removable to federal court.") Clearly, none of the legislative history reviewed in *Taylor* evidences congressional intent to occupy the field only with respect to ERISA § 502(a)(1)(B), but not the other aspects of ERISA's civil remedies provision. Although

the majority of circuits have correctly found that *Taylor* applies to all § 502(a) claims, the Supreme Court should grant certiorari to resolve the lingering confusion over this issue and the circuit split created by the Panel Opinion.

C. The Court should grant this petition to determine whether only state law claims analogous to claims available under § 502(a) are subject to complete preemption.

The Panel Opinion's rationale is based, in part, on the mistaken assumption that a state law claim must be specifically analogous to a particular cause of action available under ERISA § 502(a) in order to come "within the scope" of that provision. *Ervast*, 346 F.3d at 1015 (the basis on which Ervast seeks relief is not akin to that available under § 502(a)) (12a). Again, this aspect of the holding is seemingly inconsistent with *Taylor*. In *Taylor* there obviously was no analog in § 502(a) to the wrongful discharge and other tort claims the Court there found completely preempted. Further, other circuits have found state law claims completely preempted even though those claims were not analogous to any causes of action provided for in § 502(a). *See, e.g., Wood*, 207 F.3d at 678 (retaliatory discharge claim); *Felton*, 940 F.2d at 503 (wrongful discharge and civil rights claims).

The Panel's error apparently stems from the use of the Eleventh Circuit's "akin to" test rather than the "within the scope of" test announced in *Taylor*. The Eleventh Circuit test focuses on the similarity of a state law claim to § 502(a) claims. Whereas, the test announced by this Court focuses on whether the claims seek to vindicate rights protected by § 502(a) –

irrespective of the similarity of the state law theory to § 502(a) claims. By focusing on the similarity of a particular claim for benefits to claims under § 502(a), the Eleventh Circuit test undermines congressional intent to make § 502(a) the exclusive source of remedies for vindication of ERISA rights, which was the primary rationale for the *Taylor* holding. The test adopted by the Second Circuit – whether the claim seeks to vindicate rights protected by § 502(a) – is a more accurate application of *Taylor*. *Cicio*, 321 F.3d at 94. The Court should grant this petition in order to clarify whether *Taylor* is limited to state claims analogous to § 502(a) claims or whether it applies more broadly to any claim that seeks to vindicate rights protected by § 502(a) – as the Second Circuit has found.

Even if the correct standard is whether the claim is analogous to a § 502(a) claim, Ervast's claim is clearly analogous to a claim under § 502(a)(3). The Panel Opinion finds that it was inconsistent for the district court to conclude that Ervast's claim was completely preempted, but that his breach of fiduciary duty claim failed under ERISA because the alleged omissions were unrelated to the Plan. *Ervast*, 346 F.3d at 1015 n. 8 (19-20a). However, this Court has held that statements about a Plan sponsor's business can be subject to ERISA fiduciary duties if made in a fiduciary capacity. *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996).

Since *Varity*, a number of courts have addressed claims for breach of fiduciary duty based on misrepresentations or omissions about the sponsor's business. For example, in the wake of Enron, a number of plaintiffs have made exactly this type of claim regarding company stock held in ERISA plans. In addressing this category of claims, several courts –

including the district courts in *Enron* and *WorldCom* – have found that allegations of breach of fiduciary duty as the result of failure to disclose information about the sponsor's business are cognizable under ERISA. *See, e.g., In re Enron Corporation Securities, Derivative and "ERISA" Litigation*, 284 F. Supp. 2d 511 (S.D. Tex. 2003) ; *In re Worldcom, Inc. ERISA Litigation*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003).

In *Enron*, the plaintiffs alleged that certain defendants "breached their fiduciary duty under ERISA by failing to disclose information about Enron's dangerous financial condition that they knew or should have known to plan participants...." *Enron*, 484 F. Supp. 2d at 562. The Court held that plaintiffs had stated a claim against certain defendants "for breach of their fiduciary duty of providing information necessary for Plan Administration because they allegedly withheld from the administrative committee...material information regarding the actual financial condition of Enron." *Id.*, at 657. The Court in *Worldcom* similarly found a cognizable ERISA fiduciary breach claim based on allegations that "by failing to disclose fully and accurately infirmities in *Worldcom* stock price, [certain defendants] caused plaintiffs to make and maintain investments in *Worldcom*." 263 F. Supp. 2d at 766.

Obviously, if a viable § 502(a) claim can be based on omissions about the sponsor's business relevant to a participant's decision to hold or sell company stock, Ervast's claim that Defendants should have informed him about Flexible's merger discussions so that he could decide whether to keep or cash out his ESOP stock is clearly "within the scope" of § 502(a). In light of the proliferation of suits asserting such disclosure claims under ERISA, the Court should review whether these claims are within the scope of § 502(a).

D. The Court should grant this petition to determine whether the actual existence of an ERISA remedy is a condition precedent to a finding of complete preemption.

The Panel Opinion places significant emphasis on Ervast's lack of a viable claim under ERISA in support of its finding that his claim is not akin to a claim available under § 1132(a). *Ervast*, 346 F.3d at 1015 n. 8 ("Tellingly, when the district court also addressed whether Ervast could pursue his claim under ERISA for breach of fiduciary duty, the district court found that neither ERISA nor circuit law required Flexible, as plan administrator, to disclose discussions about a potential merger....") (19a). However, ERISA complete preemption and the actual availability of an ERISA remedy are two distinct issues. *See e.g., Wood v. Prudential Insurance Company of America*, 207 F.3d 674, 678-79 (3rd Cir. 2000) ("... a state law claim may fall within Section 502(a) and thus be completely preempted even if the plaintiff asks for relief that is not available under Section § 502(a)."); *see also Cicio v. Does*, 321 F.3d 83, 94 (2nd Cir. 2003) ("[a] suit need not be a cognizable, winning claim under § 502(a) in order to fall "within the scope" of the provision for purposes of the jurisdiction analysis.") (quoting *Plumbing Industries Board v. E.W. Howell Co., Inc.*, 126 F. 3d 61, 69) (2nd Cir. 1997)); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989) ("While our holding here will leave *Lister* without a remedy, the availability of a federal remedy is not a prerequisite for federal preemption."); *Agrawal v. Paul Revere Life Insurance Company*, 205 F.3d 297, 303 (6th Cir. 2000) ("as a general rule, the absence of a remedy under ERISA does not mean that state law remedies are preserved."). This Court should grant

certiorari to resolve the circuit split created by the Panel Opinion in this regard.

III. The Court should grant the petition to determine whether there is an affirmative fiduciary disclosure duty under ERISA.

The Panel Opinion states that: "Although we conclude that the particular type of 'failure-to-inform' claim asserted by Ervast here sounds in state law and is not preempted, we note, however, that an ERISA participant has a right to information and that a failure-to-inform claim may lie against an ERISA administrator." *Ervast*, 346 F.3d at 1016 n. 10 (20a). The Panel then cites *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300-01 (3rd Cir. 1993) for the proposition that ERISA fiduciary duties entail "not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." (*Id.*) This Court has specifically reserved the question of whether ERISA imposes affirmative disclosure obligations. *Varity*, 516 U.S. at 506 (declining to "reach the question whether ERISA fiduciaries have a fiduciary duty to disclose truthful information on their own initiative....").

In *Varity*, the Court held that statements about a plan sponsor's business are subject to ERISA fiduciary duties if there is a sufficient connection between such statements and benefits. Here such a nexus arguably exists because the omission allegedly caused Ervast to exercise his put option immediately rather than waiting until after the merger negotiations were complete. *Ervast*, 346 F.3d at 1015 (Ervast "claims a right to information that, if he possessed,

would have changed his decision making process with regard to the time he sought to collect his benefits.") Just as in *Varity*, where there was a connection between the misrepresentations and benefits because they induced plaintiffs to switch employers thereby losing benefits, Ervast alleges that the omission induced him to resign and/or exercise his put option early thereby losing additional ESOP benefits. Such a claim closely resembles the type of claim for breach of fiduciary duty under § 1132(a) this Court recognized in *Varity*.

Further, the circuits are deeply divided on the issue reserved in *Varity* – whether ERISA imposes an affirmative fiduciary disclosure obligation. In contrast to the extremely broad fiduciary disclosure obligation recognized in *Bixler* (i.e., a duty to speak whenever "silence might be harmful"), the Fifth Circuit has found no affirmative fiduciary disclosure requirement at all. *Ehlmann v. Kaiser Foundation Health Plan of Texas*, 198 F.3d 552, 555 (5th Cir. 2000) (citing *Sprague v. General Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998)). Other courts have refused to find an affirmative fiduciary disclosure obligation in the absence of a relevant inquiry from the participant. *Bins v. Exxon Company*, 220 F.3d 1042, 1053 (9th Cir. 2000).

The questions of whether affirmative disclosure duties exist under ERISA and whether representations (or omissions) concerning the sponsor's business are subject to ERISA fiduciary duties have great importance in light of the many pending claims of inadequate disclosure regarding employer stock held in 401(k) plans that have been filed in the wake of the Enron bankruptcy. *See, e.g., In re Enron Corp. Securities Derivative & ERISA Lit.*, 284 F.Supp.2d 511, 562, 657 (S.D. Tex. 2003) (finding an ERISA duty to

disclose information about the sponsor's business); *In re Worldcom ERISA Litigation*, 263 F.Supp.2d 745, 766-67 (S.D.N.Y. 2003) (same); *Stein v. Smith*, 270 F.Supp.2d 157, 173-74 (D. Mass. 2003) (failing to "fully inform" employees of material facts fiduciary CEO knew or should have known may state a claim for breach of fiduciary duty). In light of the circuit spilt and the proliferation of fiduciary disclosure claims, the Court should grant certiorari to determine the parameters of the duty recognized in *Varity*.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 02-15769, No. 02-15941

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROGER ERVAST,
Plaintiff-Appellant,

versus

FLEXIBLE PRODUCTS COMPANY, RANDY PETERSON, DOUG CRUICKSHANK,
Defendants-Appellees.

ROGER ERVAST,
Plaintiff-Appellee,

versus

FLEXIBLE PRODUCTS COMPANY, RANDY PETERSON, DOUG CRUICKSHANK,
Defendants-Appellants.

COUNSEL: For Ervast, Roger, Appellant (02-15769-HH): Kertscher, Douglas R., Atlanta,GA. Schoenthaler, Peter F., Atlanta, GA.

For Flexible Products Company, Peterson, Randy, Appellees (02-15769-HH): Hinson, Howard Douglas, Atlanta, GA.

For Cruickshank, Doug, Appellees (02-15769-HH): Hinson, Howard Douglas, Atlanta, GA. DiCarlo, Patrick Connors, Alston & Bird, Atlanta, GA.

For Flexible Products Company, Peterson, Randy, Cruickshank, Doug, Appellants (02-15941-HH): Hinson, Howard Douglas, Atlanta, GA. DiCarlo, Patrick Connors, Alston & Bird, Atlanta, GA.

For Ervast, Roger, Appellee (02-15941-HH): Kertscher, Douglas R., Atlanta,GA. Schoenthaler, Peter F., Atlanta, GA.

JUDGES: Before BIRCH and HULL, Circuit Judges, and EDENFIELD *, District Judge.

OPINIONBY: BIRCH

OPINION: BIRCH, Circuit Judge:

This case arose when an employee collected benefits from an Employee Stock Ownership Plan ("ESOP") at the time of his resignation from the company. The company did not disclose information to him about a potential merger during the time he made his decision to resign. The employee claims he was entitled to the information and seeks damages for the difference in stock price. The issue before us is whether he will litigate that claim in state court, where he filed the case, or in federal court, where the defendants removed it by arguing complete preemption under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. We conclude that the district court improperly assumed removal jurisdiction over this case because plaintiff-appellant Ervast's state law claims

for breach of corporate fiduciary duty are not super preempted by ERISA. Accordingly, the district court's denial of Ervast's motion to remand the action to state court is REVERSED, and the district court is instructed to remand the case to state court. Thus, we will not reach the merits of appeal No. 02-15941 because the district court's order denying sanctions was entered without jurisdiction over the underlying case.

I. BACKGROUND

A. The ERISA Plan

Flexible Products Company ("Flexible") stock was not publicly traded, but employees could obtain interest in the stock through the two employee incentive plans, the Employee Stock Ownership Plan ("ESOP") and the Long Term Incentive Plan ("Option Plan"). n1 Pursuant to the ESOP, Flexible made contributions to a trust, which invested primarily in Flexible stock and held the assets for the benefit of participants. The ESOP trustee maintained a separate account for each participant, however, the participants did not directly own the Flexible stock as shareholders. The ESOP provided that the "separate accounts shall not require a segregation of the Trust assets and no Participant shall acquire any right to or interest in any specific asset of the Trust as a result of the allocations provided for in the Plan." R5-57, Exh. 13 at 13.

Once a participant's employment terminated, he was entitled to a distribution commencing "not later than 120 days after the date the Participant incurs a One Year Break in Service." Id. at 25. The ESOP provided for a "put" option, which obligated either the trust or

Flexible to purchase any or all of participants' shares. Id. at 27. When the participant exercised the put, the stock's price was determined by the most recent annual independent valuation of the company's stock.

B. Ervast's Resignation and the Dow Merger

Roger Ervast was employed with Flexible and participated in Flexible's ESOP and Option Plan, wherein he accumulated significant holdings during the course of his employment. On 4 October 1999, Ervast tendered his resignation to Flexible, effective 15 October. On 5 October, Flexible discovered that Ervast would be employed with a competitor, Hydroseal, promptly escorted him from company property because he had access to confidential information, and paid him two weeks' compensation in lieu of notice. Immediately following his 5 October termination, Ervast exercised his rights under the ESOP and "put" his shares under the ESOP. On 12 October, Ervast received his payout from the ESOP and sold his stock under the Option Plan. Pursuant to Ervast's instructions, Flexible remitted a total of $ 448,648.10 from the Flexible Products ESOP, which was transferred directly to a rollover individual retirement account ("IRA").

During the fall of 1999, Flexible entertained the idea of selling the company to an interested buyer, Dow Chemical Company ("Dow"). In September 1999, the managers of both companies met to discuss the potential acquisition and negotiated a confidentiality agreement in exchange for Dow's agreement to make a takeout bid. On 1 October 1999, the parties entered into a confidentiality agreement and two managers entered into financial payout agreements in the event the

merger was consummated. On 7 October, the senior management of both companies held a meeting, after which Dow's Senior Vice President indicated an offer to purchase Flexible was pending. On 26 October, Dow offered a price Flexible was willing to consider. On 10 November 1999, Flexible executed a letter of intent with Dow, authorizing the parties to engage in discussions about a potential merger. In January 2000, the merger was consummated and the Flexible ESOP merged into the Dow benefit plan and then ceased to exist. During the pendency of the sale, no one disclosed to Ervast the existence of the merger negotiations at the time he sold his Flexible stock. After the merger between Flexible and Dow was consummated, the 26 October 1999 date was selected as the point after which the shareholders who sold their Flexible shares were to receive the higher merger price because it was the date Flexible deemed the merger negotiations became "material."

C. Procedural History

On 23 June 2001, Ervast filed suit against Flexible Products Company, Randy Peterson, and Doug Cruickshank n2 in the State Court of Fulton County, Georgia, alleging breach of fiduciary duty and [*6] negligence resulting from Flexible's failure to disclose material information that would have affected Ervast's decision to liquidate his account in Flexible stock in the ESOP. On 28 February 2001, Flexible removed the case to the federal district court in the Northern District of Georgia. On 18 July 2001, Ervast filed a motion to remand the case to state court for lack of subject matter jurisdiction. The district court denied Ervast's motion to remand, finding that his claims were "related

to Defendants' administration of an ERISA plan," because the ESOP would have to be referenced to determine the value the Flexible stock. R4-43 at 5. As a result, the district court determined that Ervast's claims were super preempted by ERISA, and that federal question jurisdiction existed over Ervast's claims. n3

During discovery, Flexible filed a motion for summary judgment and Ervast filed a motion for partial summary judgment. The district court awarded summary judgment to Flexible and denied Ervast's motion. Although Ervast's complaint contained allegations in the rubric of state law, the district court determined that Ervast need not amend his complaint and the court construed the complaint to state a claim for recovery of benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The district court then found that, in accordance with the undisputed facts, there was no evidence that Ervast was denied any benefits under the ESOP. Because the district court found previously that Ervast's claim was super preempted by ERISA as a claim for benefits, he could not maintain his claim for breach of fiduciary duty, despite the fact that he continually couched his argument in such terms. Nevertheless, "out of an abundance of caution," the district court addressed the breach of fiduciary duty claim under 29 U.S.C. § 1132(a)(3), and found that no fiduciary duty existed under ERISA for a plan administrator to disclose material business decisions of the company. R6-76 at 10. From this order, Ervast properly filed his notice of appeal, No. 02-15769.

D. Ervast's Deposition Dishonesty and Flexible's Motion for Sanctions

During discovery, Flexible determined that Ervast gave false testimony in his deposition regarding the date he communicated his acceptance of the Hydroseal offer. In addition, Ervast allegedly failed to produce a letter dated 27 September that Flexible argues proved the falsity of his statements, in response to the Rule 34 document requests. On these two bases, Flexible filed a motion for sanctions, which the district court denied because it found that there was no evidence that Ervast possessed the letter and that Flexible had not demonstrated a Rule 37(c) violation. Thereafter, Flexible properly filed its notice of appeal, No. 02-15941.

II. DISCUSSION

Ervast's appeal presents two issues: the first focuses upon the denial of his motion to remand the case to state court; and, second, the grant of Flexible's motion for summary judgment and the denial of his motion for partial summary judgment. Flexible appeals the denial of its motion for sanctions against Ervast for allegedly making dishonest statements during his deposition. Because the preemption issue is a jurisdictional predicate, we first discuss whether Ervast's state law claims were super preempted by ERISA and the district court properly denied his motion to remand. n4 Because we disagree with the district court's decision that Ervast's claims were super preempted by ERISA, the district court never had subject matter jurisdiction over the case, and Ervast's appeal of the district court's summary judgment is moot. We will not address Flexible's appeal of the district court's order denying sanctions against Ervast because it also was rendered without jurisdiction over the underlying case.

Ervast's appeal is before us because his state law claims were removed by Flexible invoking federal question jurisdiction in the form of ERISA complete (or, alternatively, super) preemption, and Ervast's motion to remand was denied. A district court's preemption analysis is reviewed de novo. Hall v. Blue Cross/Blue Shield of Fla., 124 F.3d 1068, 1069-70 (11th Cir. 1998).

Removal jurisdiction based on a federal question is governed by the well-pleaded complaint rule. Taylor v. Anderson, 234 U.S. 74, 75-76, 34 S. Ct. 724, 725, 58 L. Ed. 1218 (1914); Kemp v. IBM, 109 F.3d 708, 712 (11th Cir. 1997) (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 11, 103 S. Ct. 2841, 2845, 77 L. Ed. 2d 420 (1983)) (ERISA context). In plain terms, unless the face of a plaintiff's complaint states a federal question, a defendant may not remove a case to federal court on this basis, even though a possible defense might involve a federal question. Kemp, 109 F.3d at 712. A narrow exception to this rule is super, or complete, preemption, existing when Congress has so fully legislated an area of law such that a plaintiff's state law claims filed in state court are "necessarily federal in character" and removable based on federal question jurisdiction. id. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 107 S. Ct. 1542, 1546, 95 L. Ed. 2d 55 (1987); Kemp, 109 F.3d at 712.

Whether complete preemption applies is a jurisdictional issue, which must be addressed first and is separate and distinct from whether a defendant's ERISA § 514, 29 U.S.C. § 1144, preemption defenses apply, although there might be some overlap between the two issues. id. Land v. Cigna Healthcare of Fla., 339 F.3d 1286,

1294 at 1289-90, 1294 n.7 (11th Cir. July 30, 2003); see also Schmeling v. Nordam, 97 F.3d 1336, 1338 (10th Cir. 1996). [*12] We set forth the four-part test for determining ERISA super preemption in Butero v. Royal Maccabees Life Insurance Co., 174 F.3d 1207, 1212 (11th Cir. 1999): a (1) relevant ERISA plan exists, under which a (2) plaintiff with standing is suing (3) an ERISA entity for (4) "compensatory relief akin to that available under § 1132(a), often this will be a claim for benefits due under a plan."

Ervast urges us to reverse the district court's denial of his motion to remand because the district court did not thoroughly consider whether his claims were super preempted under Butero, but instead it authorized removal on the basis of defensive preemption, an impermissible basis. Metropolitan Life, 481 U.S. at 63, 107 S. Ct. at 1546 ("Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court."); Butero, 174 F.3d at 1212. Further, Ervast argues that the nature of his claim did not fulfill the first, second, and fourth prongs of the Butero analysis. First, we hold that the district court erred in deciding the super preemption issue by applying the defensive preemption analysis. Second, we hold that Ervast's claims did not seek "compensatory relief akin to that under § 1132" under the fourth prong, and thus we need not reach the arguments concerning the remaining three prongs of the Butero analysis. Accordingly, Ervast's claims were not super preempted.

State law claims are completely preempted by ERISA, and thus removable to federal court as federal claims

pursuant to the Butero analysis, if they state a claim seeking the relief "akin to" that provided for in § 1132(a). Section 1132(a)(1)(B) permits a civil action by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . ." If a state court plaintiff's state law claim seeks this relief, then the plaintiff is deemed to have brought a federal claim, the state law claims are thus converted to a federal claim under § 1132, and the case is removable via federal question jurisdiction.

Not all state law claims are completely preempted and may be subject to ERISA defensive preemption only. What is often confused is that these are two different questions. The issue of complete preemption is jurisdictional; meaning, if the claims are not completely preempted, they are not properly removed and must be remanded to state court. Land, 339 F.3d at 1290. The defensive preemption issue, however, is substantive; therefore, either in state or federal court, when a state law claim is brought, the defendant may raise the defense that the claims are preempted by ERISA under § 1144, and should be dismissed. Super preemption, on the other hand, recharacterizes the state law claim into a federal claim under § 1132, so long as the other three Butero elements are present.

That being said, if Everett's state law claim for breach of fiduciary duty is actually (1) a claim for recovery of benefits due under the terms of the plan, (2) a claim seeking to enforce his rights under the terms of the plan, or (3) a claim for clarification of future benefits under the terms of the plan; it is construed as a federal

civil action under § 1132(a), is completely preempted, and confers federal question jurisdiction. See Land, 339 F.3d at 1290. Although state-law claims involving the denial of employee benefits invariably yield to ERISA substantive law, the presence of an ERISA plan within the facts of a case does not, on its own, automatically subject the litigant to federal question jurisdiction. Instead, along with the other three elements of the Butero super preemption analysis, [*16] the court evaluating federal question jurisdiction must parse the elements of the claim to ascertain whether the claim, and not just the factual scenario, states a claim resonant of recovery under § 1132. In Land, we recognized our past precedent indicating that § 1132(a)(1)(B) claims "essentially are contract claims." 339 F.3d at 1293 (citing Harrison v. Digital Health Plan, 183 F.3d 1235, 1241 (11th Cir. 1999)).

At the time of removal, Ervast's complaint alleged four counts: breach of fiduciary duty, attorney's fees and expenses, punitive damages, and an alternative count of negligence. In essence, Ervast claims that he is entitled to the difference in the price he received for his ESOP shares and post-merger announcement price of the shares because the defendants, as the majority shareholder and officers/significant shareholders, had the fiduciary duty to inform him as a minority shareholder, of the merger discussions with Dow and they did not. If he had access to this information, Ervast maintains that he would have postponed his resignation or put option in order to realize the post-merger share price. Ervast does not contend that the valuation for the shares he received under the ESOP was improper under the terms of the ERISA plan. Rather, he hinges defendants' liability on a failure to

communicate material information to which he allegedly was entitled as a shareholder and affected his individual decision to resign and cash out his participant account of shares under the ESOP.

The relief Ervast seeks, and the basis upon which that relief is sought, is not akin to that available under § 1132(a). Ervast's allegations do not in any way involve a clarification of his rights, nor is he seeking to enforce his rights *under the terms* of the ESOP. Ervast does not dispute the distribution he received as being contrary to the terms of the plan, or that under its terms he should have received more than he did. Thus, neither the second nor third types of claims for recovery under § 1132(a) are applicable here.

The first type of § 1132(a) claim - for recovery of benefits due under the terms of the ERISA plan - is what the district court construed Ervast's state law claim to be seeking. However, that assessment was incorrect. In its summary judgment order, the district court construed Ervast's state law claims as brought under § 1132 for recovery of benefits and the court addressed the merits of Flexible's summary judgment motion. The court determined that, even though it liberally construed Ervast's unamended complaint, he could not maintain a claim for a denial of benefits under § 1132 because the valuation of the stock was consistent with the terms of the ESOP. n8 This conclusion exposes the preexisting error by the district court - Ervast's claim does not contest his distribution under the terms of the ESOP. Instead, he claims a right to information that, if he possessed, would have changed his decision making process with regard to the time he sought to collect his benefits. Ervast also does not claim

entitlement to this information under the terms of the ESOP; rather, his claim is based on his status as minority shareholder and the duty owed him by the majority shareholders.

Although Ervast was a participant n9 in the ESOP and Flexible was the plan sponsor, we are not considering a claim casting the parties in these roles. Instead, the breach of corporate fiduciary duty is premised on the parties' roles of majority and minority shareholders. The state law action does not implicate the traditional ERISA roles, nor does it call into question the administration of the ESOP. See Hook v. Morrison Milling Co., 38 F.3d 776, 784 (5th Cir. 1994) ("ERISA's preemptive scope may be broad but it does not reach claims that do not involve the administration of plans, even though the plan may be a party to the suit or the claim relies on the details of the plan."). Accordingly, we hold that Ervast's state law claim for breach of corporate fiduciary duty is not completely pre-empted because it does not seek compensatory relief "akin to" that available under § 1132. n10

To divest a state court of jurisdiction and a plaintiff of his chosen forum in this situation by complete preemption, would overreach the scope of actions Congress sought to bring within the purview of ERISA civil enforcement actions. Ervast's claim is not addressing whether he received what money he was entitled to under the ESOP, but rather whether he was entitled as a minority shareholder to the information Flexible, as the majority shareholder, possessed. Converting his state law claims derived from state law duties to an ERISA civil action subject to complete preemption would serve to insulate majority

shareholders from minority shareholders seeking to exercise their rights by the coincidental nature in the means by which those minority shares were obtained, an ERISA plan.

We are not confronted with an "artful pleader" that has found a way around ERISA preemption by couching the terms of his claim for benefits in a creative way. See Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1354 n.11 (11th Cir. 1998). Simply put, Ervast claims that Flexible Products Co., Randy Peterson, and Doug Cruickshank, as the majority shareholder and corporate officers, had the fiduciary duty to tell him, as a minority shareholder, that it was considering a merger with Dow. Georgia corporate law permits this direct action by a minority shareholder, apparently even if those shares are held in a trust form, as were Ervast's in the ESOP. Next Century Communications Corp v. Ellis, 171 F. Supp. 2d 1374, 1381 (N.D. Ga. 2001); see O.C.G.A. § 10-5-2(a)(26) (defining "security" broadly). n11 Whether the defendants were required to tell Ervast about the merger and whether it was a breach of their fiduciary duty as majority shareholder and corporate officers because they did not, can only be answered by Georgia state law. Their duty to him, if any, exists by nature of state law only. As the district court noted, there was no duty under ERISA that the defendants to inform him of the pending merger because the fiduciary relationship between a majority and minority shareholders is not one derived from ERISA. See Lupo, 28 F.3d at 273-74 (deciding that a plaintiff's state law claims for professional malpractice, breach of fiduciary duty, and intentional infliction of emotional distress against employer of psychotherapist which had contracted with plaintiff's employer to provide services

in connection with employee health benefit plan governed by ERISA, did not state a claim arising under ERISA for purpose [*23] of federal question jurisdiction). That is because the claim that Ervast brought against the defendants is not an ERISA civil action for the recovery of benefits due under the terms of the plan, but grounded in state law. Ervast originally sought his answer in state court and, in our view, it is the state court, and not the federal court, that has the jurisdiction and authority to give it to him. Ervast's claim was not seeking compensation akin to that available under § 1132, it was not super preempted by ERISA, and it was improperly removed to federal court on that basis. Accordingly, the district court's denial of Ervast's motion to remand is reversed and the district court is instructed to remand the case to State Court of Fulton County, Georgia. n12

III. CONCLUSION

Ervast's state law action was improperly removed to federal court because his state law claims were not completely preempted by ERISA, even though his minority shareholder rights derived from shares held in an ERISA plan. The duties owed him by Flexible and allegedly breached are grounded in state law and not ERISA. The claims did not seek relief akin to that available under § 1132 and could not form the basis of removal under federal question jurisdiction. Accordingly, the district court's denial of Ervast's motion to remand is REVERSED and the district court is instructed to remand the case to the State Court of Fulton County, Georgia. Flexible's appeal is moot because the district court's decision was rendered without jurisdiction.

REVERSED WITH INSTRUCTIONS.

Footnotes

*Honorable B. Avant Edenfield, United States District Judge for the Southern District of Georgia, sitting by designation.

n1 Ervast also directly purchased Flexible stock under the Option Plan. The provisions of the Option Plan and the disbursement thereunder to Ervast is not at issue before us.

n2 Unless required for differentiation purposes, the defendants-appellees collectively will be referred to as "Flexible."

n3 The entirety of the district court's discussion regarding ERISA preemption is contained in two orders: the order denying Ervast's motion to remand, R4-43, and then further elaborated upon in the order granting Defendant's motion for summary judgment, R6-76. We note at the outset that the district court preformed a preemption analysis by only focusing on defensive preemption pursuant to ERISA § 514(a), 29 U.S.C. § 1144(a), thereafter declaring that super preemption was appropriate without performing the requisite super preemption analysis set forth in Butero v. Royal Maccabees Life Ins., 174 F.3d 1207, 1212 (11th Cir. 1999).

n4 Flexible argues, tardily, in its appellate brief, that there also exists diversity jurisdiction, therefore, removal was proper absent the existence of ERISA super-preemption. Although that may be the case, we

decline the invitation to exercise jurisdiction on that basis because Flexible had the burden to plead this basis in its notice of removal, and it did not. See Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269, 273 (2d Cir. 1994); Leonard v. Enterprise Rent A Car, 279 F.3d 967, 972 (11th Cir. 2002) ("A removing defendant bears the burden of proving proper federal jurisdiction."); see also Edwards v. Prudential Ins. Co. of Am., 213 F. Supp. 2d 1376, 1380 n.6 (S.D. Fla. 2002) (declining to investigate the existence of diversity jurisdiction sua sponte and recognizing tension between resolving doubts in favor of remand and Congress's ability to completely preempt an area of law, i.e., in ERISA).

n5 Whether a plaintiff's claims are super preempted by ERISA is determined at the time of removal. Whitt v. Sherman Int'l Corp., 147 F.3d 1325, 1332 (11th Cir. 1998).

n6 Super preemption is distinguished from defensive preemption, which provides only an affirmative defense to state law claims and is not a basis for removal. Defensive preemption is not a basis for federal jurisdiction, but it does require the dismissal of state law claims. Butero, 174 F.3d at 1212. ERISA defensive preemption applies pursuant to Title 29, U.S.C. § 1144(a), which provides: "Except as provided in subsection (b) of this section, the provisions of this subchapter . . . shall supersede any and all State laws insofar as they . . . *relate to* any employee benefit plan . . . ." (emphasis added). If a state law claim is defensively preempted by ERISA, it is dismissed from the suit.

n7 The district court's confusion is not unfounded. There are seemingly two approaches employed by the

circuit courts resulting from similar confusion: that is, whether the § 1144 preemption provision in ERISA is a component, or prerequisite, of the complete preemption analysis. See Tovey v. Prudential Ins. Co. of Am., 42 F. Supp. 2d 919, 923-24 (W.D. Mo. 1999) (noting the split between circuits that applied a two prong analysis and those that did not require defensive preemption as a prerequisite to complete preemption). Some circuits require defensive preemption as a prerequisite to complete preemption, thus applying a two-step analysis, while other circuits do not. Tovey listed our circuit as applying the two-step analysis, citing Franklin v. QHG of Gadsden, Inc., 127 F.3d 1024, 1028 (11th Cir. 1997) ("ERISA 'completely preempts the area of employee benefit plans and thus converts state law claims into federal claims when the state law claim is preempted by ERISA and also falls within the scope of the civil enforcement section of ERISA, Section [1132(a)]."); however, in Butero, we did not follow the language in Franklin and considered it *dicta*. Butero set forth the proper complete preemption analysis and made no mention that defensive preemption was a prerequisite. Butero, 174 F.3d at 1212.

The en banc Fifth Circuit recently in Arana v. Ochsner Health Plan, 338 F.3d 433 (5th Cir. July 10, 2003) (en banc), disentangled the analyses and held them to be distinct inquiries, and overruled its prior precedent that merged the two. It refused to reach the issue of defensive preemption because it is a substantive, and not jurisdictional, issue, and if a state law claim is not completely preempted because it seeks relief available under § 1132(a), then it is inappropriate to decide the substantive issue of defensive preemption without proper jurisdiction. Id. at 439-40.

Defensive preemption may not be a prerequisite for complete preemption, but they usually co-exist. Naturally, if a claim were for the recovery or clarification of benefits under an ERISA plan, then the claim will "relate to" the plan. There are, however, statutory exceptions to ERISA preemption under § 1144, i.e., state securities and insurance laws, and thus a state securities claim might appropriately be completely preempted, but defensive preemption may not apply. 29 U.S.C. § 1144(b)(2)(A) (saving state insurance, banking, or securities laws from preemption); see Arana, 338 F.3d at 439-40. To explicitly require defensive preemption under § 1144 would permit a loophole for state law claims that are excepted from defensive preemption to avoid appropriate complete preemption, thus denying a party federal jurisdiction. This is not to say that the "relate to" analysis and the law interpreting such can not inform the issue facing a court that must determine whether state law claims are completely preempted, however, complete preemption is not *dependent* on the existence of defensive preemption. Moreover, a decision regarding complete preemption does not decide the issue of defensive preemption. As we stated, supra note 7, defensive preemption is a substantive issue that must be decided by a court with competent jurisdiction.

n8 In addition, the court observed that Ervast could not simultaneously sustain a claim for benefits and a claim for breach of fiduciary duty, pursuant to 29 U.S.C. § 1104, because they are duplicative. R6-76 at 7 (citing Harrison, 183 F.3d at 1237 n.1). Tellingly, when the district court also assessed whether Ervast could pursue his claim under ERISA for a breach of fiduciary duty, the district court found that neither ERISA nor

circuit law required Flexible, as a plan administrator, to disclose discussions about a potential merger, because the merger plans "did not pertain to the ESOP itself, but rather to a potential business decision unrelated to the administration of the trust. . . . Any disclosure duty found in § 1104 extends only to information about the ERISA plan or its administration, and not to general business decisions." Id. at 12. In actuality, Ervast's claim is not really that Flexible, as a plan administrator, owed him the duty, but Flexible, as majority shareholder, owed him the duty to disclose information about the potential merger. But, by attempting to force a square peg in a round hole, the district court reached the inconsistent conclusion that Ervast's state law claims were preempted by ERISA, however, his claim could not be sustained under ERISA because it was for a breach of fiduciary duty unrelated to the administration of the plan.

n9 The parties dispute whether Ervast was a participant at the time of removal. We are not addressing that issue before us, however, for the purpose of our analysis we are presuming that, at one time, Ervast was a participant in the ESOP.

n10 Although we conclude that the particular type of "failure-to-inform" claim asserted by Ervast here sounds in state law and is not preempted, we note, however, that an ERISA participant has a right to information and that a failure-to-inform claim may lie against an ERISA administrator. See Krohn v. Huron Mem'l Hosp., 173 F.3d 542, 548-51 (6th Cir. 1999) (an ERISA fiduciary with knowledge of a beneficiary's status and situation has an affirmative duty to communicate material facts to the beneficiary which

will allow for an informed decision); Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund, 12 F.3d 1292, 1300-01 (3rd Cir. 1993) (an ERISA fiduciary's duty to provide "complete and accurate information to its beneficiaries" "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful.").

n11 We are not in the position to evaluate the feasibility of Ervast's claim or his relative chance of success in state court. Our sole concern is the nature of the state law claim and whether it is completely preempted by ERISA.

n12 Because the action is remanded to state court for lack of federal question jurisdiction, the district court's order granting Flexible's motion for summary judgment is VACATED.

Filed 9/25/2002

Civil Action No. 1:01-CV-0564-JOF

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

ROGER ERVAST,
Plaintiff,

versus

FLEXIBLE PRODUCTS COMPANY, RANDY PETERSON, DOUG CRUICKSHANK,
Defendants.

ORDER

This matter is before the court on defendants' motion for summary judgment [57] and plaintiff's motion for partial summary judgment [59].

I. STATEMENT OF THE CASE

A. Procedural History

Plaintiff, Roger Ervast, filed the instant suit against Defendants Flexible Products Company ("Flexible"), Randy Peterson, and Dough Cruickshank, both officers of Flexible, on January 23, 2001, in the State Court of Fulton County, Georgia. Plaintiff alleges breach of fiduciary duty, negligence, and violation of Georgia securities law resulting from Defendants' failure to disclose material information that would have affected Plaintiff's decision to sell Flexible stock. Defendants removed the case to federal court on February 28, 2001.

Plaintiff filed a motion to remand, and in an order dated November 6, 2001, this court denied Plaintiffs motion. The court found that his claims were sufficiently related to the Employee Retirement Income Security Act ("ERISA"); 29 U.S.C. §1144(A), as to be preempted by that statute, and found that remand was therefore improper. On February 25, 2002, both Plaintiff and Defendants filed motions for summary judgment.

B. Facts

The following facts are undisputed. Plaintiff began working for Defendant Flexible Products in 1987 as a chemist. During his employment, Plaintiff participated in the company's Employee Stock Ownership Plan (the "ESOP"). Pursuant to the ESOP, flexible made contributions to a trust, which invested the contributions primarily in Flexible stock and held such assets for the benefits of the participants. The ESOP trustee then established and maintained a separate account for each participant. Pursuant to the terms of the ESOP, once a participant's employment is terminated, he is entitled to a distribution commencing "not later than 120 days after the date the Participant incurs a One Year Break in Service." Flexible's stock was not traded publicly, and so the ESOP provided participants with a "put option." The put option obligated either the trust or Flexible itself to purchase any or all shares of Flexible stock that the participant held in his account.fn1 The price paid for the stock was determined by an annual independent valuation of company stock.

On October 4, 1999, Plaintiff submitted a letter of resignation. The next day, Plaintiff exercised his ESOP

put option. On October 12, 1999, Plaintiff completed a Notice of withholding on Qualified Total Distributions, electing to have his ESOP distribution made to himself and his Schwab rollover IRA. On that same day, Flexible issued Plaintiff a check for $448,645.10 from the Flexible Products ESOP. On November 10, 1999, Flexible executed a letter of intent with Dow Chemical Company ("Dow"). The letter of intent authorized Flexible and Dow to engage in discussions about a potential merger.

II. DISCUSSION

A. Plaintiff's Allegations

Plaintiff alleges that between September 15, 1999 and November 10, 1999, Flexible and Dow held various meetings and were generally engaged in merger discussions since September 15, 1999. Plaintiff argues that Defendants knew that the merger was going to take place, and that Defendants therefore had a fiduciary duty to notify him of this fact upon his resignation. Plaintiff claims that because he was unaware of the pending merger, he sold his Flexible stock immediately upon his departure from the company. Plaintiff alleges that had Defendants notified him that a merger with Dow was potentially forthcoming, he would have waited to sell his stock and would have received significantly more money. In his response to Defendants' motion for summary judgment, Plaintiff alleges for the first time that he was also mislead by Flexible's Vice President Corporate Comptroller, Wayne York. Plaintiff alleges that he and York met on October 5, 1999 to discuss Plaintiffs Flexible stock. Plaintiff alleges that York told him that he had to exercise the put option immediately, and that

this statement was incorrect and misleading. Plaintiff argues that but for this misleading statement, he would have retained his flexible stock and could have benefitted from the merger with Dow.

B. Initial Matters

In its order of November 6, 2001, this court found that Plaintiff's state law claims were preempted by ERISA. The court begs by noting that shares of Flexible are not publicly traded. As a result, there existed no independent means of determining the value of Flexible shares. The court found that the only way to determine the price of Flexible shares was to refer to the ESOP itself, which sets forth the method by which share value is determined. The court found that because Plaintiff was arguing that his Flexible shares should have been valued at the post-merger price, he was effectively seeking compensation for a denial of benefits under an ERISA plan. Because Plaintiff's claim was related to an ERISA plan, and because the claim for denied benefits fell within the civil enforcement section of ERISA, the court concluded that Plaintiffs state lard claims for negligence, breach of fiduciary duty, and state securities violations were preempted by ERISA.

There appears to be considerable confusion on both sides as to the effect of ERISA preemption on Plaintiff s claims. First, the court notes that both sides expend significant time briefing the issue of whether Defendants' actions violate Georgia securities law. As the court explicitly stated in its prior order, however, Plaintiff's state law claims are completely preempted by ERISA. The question of whether merger discussions with Dow are "material" for purposes of the Georgia Securities Act is therefore wholly irrelevant to

the instant case, Accordingly, the court will disregard any portion of the motions for summary judgment not related to the question of whether Plaintiff's claims can proceed under ERISA. There also appears to be substantial confusion as to what code section of ERISA Plaintiff's claim arises under, as well as whether Plaintiff must amend his complaint specifically to include ERISA claims.

First, the court finds that Plaintiff need not amend his complaint as a matter of law. In finding that Plaintiff's claim was related to an ERISA plan, the court was concluding, albeit implicitly, that Plaintiffs claim was subject to "complete preemption" (sometimes referred to as "superpreemption"). The Eleventh Circuit thoroughly explains the nature of complete preemption in the case of Blab T. V. of Mobile, Inc. v. Comcast Cable, 182 F.3d 851 (11th Cir. 1999). Complete preemption "functions as a narrowly drawn means of assessing federal removal jurisdiction, while ordinary preemption operates to dismiss state claims on the merits and may be involved in either federal or state court." Id. at 854-55. The court went on to quote the Fifth Circuit's summary of the issue:

> "[C]omplete preemption" is less a principle of substantive preemption than it is a rule of federal jurisdiction. In other words, complete preemption principally determines not whether state or federal law governs a particular claim, but rather whether that claim will, irrespective of how it is characterized by the complainant, [serve as the basis for federal question jurisdiction].

Id. at 855 (quoting McClelland v. Gronwaldt, 155 P.3d 507, 516-17 (5th Cir. 1998) (alteration in original)). Complete preemption exists where: (1) there is a relevant ERISA plan; (2) the plaintiff has standing to sue under the plan; (3) the defendant is an ERISA entity; and (4) the complaint seeks compensatory relief, such as benefits due under the plan, contemplated by ERISA. Butero v. Royal Maccabees Life Ins. Co., 174 F.3d 1207, 1212 (11th Cir. 1999), Where a plaintiff's state law claims are completely preempted by ERISA, they are properly recast as claims arising under ERISA. Id. at 1213 (finding that because the plaintiff's complaint satisfied the four requirements of complete preemption, his claims were properly "recast as claims for benefits due under any plan"); see also Hall v. Blue Cross/Blue Shield of Alabama, 134 F.3d 1063, 1065 (11th Cir. 1998) ("Accordingly, if state law claims implicate ERISA's preemption clause and fall within the scope of ERISA's civil enforcement section, then they are converted into federal claims.").

When Defendants sought removal of the instant case to federal court, they did so under the theory that Plaintiff's claims were subject to complete preemption. See Defs.' Mot. to Remove. While the court did not do so explicitly, its conclusion in the November 6, 2001 order that Plaintiffs claims are sufficiently related to ERISA and that Plaintiff was seeking compensation for the denial of benefits was a conclusion that the claims were subject to complete preemption. As the Eleventh Circuit has indicated that complete preemption converts a plaintiffs claims into ERISA claims, and because the court can find no authority for the proposition. that Plaintiff must amend his complaint after a finding of complete preemption, the court

concludes that Plaintiff had no obligation to amend his complaint as a matter of law.

Finally, substantial confusion exists on both sides as to the proper scope of Plaintiff's instant ERISA claim, In its November 6, 2001 order, the court concluded that Plaintiffs claim was effectively an action to recover benefits. The ERISA provision that allows for the recovery of benefits is 29 U.S.C. § 1132(a)(1)(B).

This section allows ERISA plan participant to bring suit "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Where a plaintiff brings a claim for recovery of benefits under this section, he may not also bring a claim for breach of fiduciary duty. See Harrison v. Digital Health Plan, 183 F.3d 1235, 1237 n.l (11th Cir. 1999) (affirming the district court's denial of the plaintiff's breach of fiduciary duty claim because it was duplicative to the plaintiff's claim for recovery of benefits under §1 l 32(a)(1)(B)). Yet that is what Plaintiff has done here. Plaintiff's sale argument now appears to be that Defendants breached their fiduciary duty to Plaintiff, either by failing to inform him that merger discussions were taking place, or by giving him incorrect information about the proper exercise of his put option. In short, Plaintiff has completely failed to address the issue of whether he may recover benefits pursuant to the applicable ERISA statute, § 1132(a)(1)(B). Such an action is improper. See Harrison, 183 F.3d at 1237 n.1. Again, the court found in its prior order that Plaintiff's case was properly treated as a claim for the recovery of benefits. Accordingly, his claim must be analyzed under § 1132(4)(1)(B).

C. Recovery of Benefits

As previously stated, § 1132(a)(1)(B) provides a private right of action for persons alleging entitlement to benefits pursuant to the terms of an ERISA plan. Accordingly, the court looks to the terms of the ESOP to determine whether Plaintiff was denied any benefits by exercising his put option on October 5, 1999, The court will briefly review the relevant plan provisions. Article 7 of the ESOP governs distributions to plan participants. Section 7.1(d) provides that where an employee's job is terminated. prior to his retirement date, distribution of the ESOP assets shall commence "not later than 120 days after the date the Participant incurs a One Year Break in Service." Section 7.5 governs a participant's put option, and provides that a participant may sell any or all Flexible stock to the Trust. If the Trust refuses to buy the stock, then Flexible itself is required to buy the shares. Section 7.5(b) governs the valuation of Flexible stock, and provides that the purchases precise to be paid for any Flexible stock "is the fair market value determined...as of the Valuation Date coinciding with or next preceding the exercise of the put option under this Section 7.5 . . . ." Finally, section 8.6 governs the claims procedure and requires participants to file written claims for benefits detailing the nature of the claim axed requesting a determination of its validity under the terms of the Plan.

The court finds no evidence that Plaintiff was denied any benefits under the ESOP. As an initial matter, Plaintiff has presented no evidence that he complied with the ESOP's requirements that he file a written claim challenging the valuation of his stock.

Even assuming, arguendo, that he had complied with the terns of the plan and filed a written claim, the valuation of Flexible stock appears to be consistent with the terms of the Plan. According to a letter sent by York to Plaintiff on October 12, 1999, the value of Plaintiff's stock was determined as of September 30, 1999, See Depo. of Ervast, Ex. 15. Plaintiff has not alleged, and the court has not found, that such an action was inconsistent with the valuation procedure set forth in section 7.5(b). The court finds no evidence that the terms of the FSOP required Flexible to value Plaintiff's shares at a higher price, or that Flexible was obligated to re-value Plaintiff shares after it announced the merger with Dow. Plaintiff has, in sum, tendered no evidence that the instant distribution was in anyway violative of the plan provisions. Accordingly, the court finds that Plaintiff has failed as a matter of law to state a claim for recovery of benefits under § 1132(a)(1)(B).

D. Breach of Fiduciary Duty

As part of its preemption analysis, the court concluded that Plaintiffs claim was properly viewed as one for the recovery of benefits. Based on this determination, the court found that Plaintiff's claim was completely preempted and that jurisdiction in. federal court was therefore proper. Yet Plaintiff has continually argued that his claim is properly viewed as one for breach of fiduciary duty. As previously noted, where a plaintiff's claim is properly construed as a claim for benefits, he May not, under ERISA, also bring a claim for breach of. fiduciary duty. See Harrison, 183 F.3d at 1237 n.l. In spite of this rule, and in spite of the fact that it was not the basis for this court's superpreemption determination, the court will, out of an abundance of caution, address the merits of Plaintiffs breach of

fiduciary duty claim.

A brief explication of the statute is necessary. Suits for breach of fiduciary duty under ERISA are brought pursuant to 29 U.S.C. § 1132(a)(3). See Parity, Corp. v. Howe, 516 U.S. 459, 512 (1996). Known as ERISA's catch-all provision, this section provides that a civil action may be brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of the subchapter or the terms of the plan." The United States Supreme Court has held that while the equitable relief contemplated by this section does not allow a claim for compensatory damages, it will support a claim for restitution. Mertens v. Hewitt Assocs., 508 U.S. 248, 255-55 (1993).

Even if this court had found in its November 6, 2061 order that Plaintiff's claim somehow constituted a claim of restitution for breach of fiduciary duty under 29 U.S.C. § 1132(x)(3), it would still fail as a matter of law. Plaintiff alleges that Defendants breached their fiduciary duty when they (1) failed to inform him of the pending merger; and (2) misinformed him about the nature of the put option. Plaintiff's first allegation fails as a matter of law, as neither ERISA nor circuit precedent mandates that Defendants disclose internal discussions about a potential merger to Plaintiff. ERISA enumerates those situations in which a plan administrator or fiduciary is obligated to disclose information to plan participants. See 29 U.S.C. §§ 1021-1031, For example, ERISA requires the plan administrator to provide participants with the latest

updated summary plan description, the latest annual report, a statement to each participant indicating the total benefits accrued, and other instruments under which the plan is established or operated." 29 U.S.C. §§ 1024(b)(4), 1025(a)(1). Nowhere in any of these sections is there any requirement that a plan administrator disclose information about a potential merger to a plan participant.

Plaintiff argues, however, that the duty to inform him of the pending merger falls instead within the broader requirement that a plan fiduciary act in the interest of the plan participants. In support of this argument, Plaintiff cites Hamilton v. Allen-Bradley Co., Inc., 244 F.3d 819 (11th Cir. 2001), for the proposition that Defendants had an obligation to volunteer information about the pending merger even though Plaintiff never requested the information. The court disagrees.

Title 29 U.S.C. § 1104(a)(1) imposes on fiduciaries a "prudent man standard of care" and requires a fiduciary to discharge his duties with respect to a plan "solely in the interest of the participants and beneficiaries." Various courts have found that this section, in certain situations, imposes an additional duty of disclosure on fiduciaries. See, e.g., Drennan v. General Motors Corp., 977 F.3d 246, 252 (6th Cir. 1992). For the reasons stated below, however, the court finds that § 1104(a)(1) did not obligate Defendants to disclose plans of the potential Dow merger to Plaintiff. First, the court finds significant the fact that the undisclosed information did not pertain to the ESOP itself, but rather to a potential business decision unrelated to the administration of the trust. A fundamental premise in the ERISA scheme is that "employers will act in a dual capacity, both as

fiduciary to the plan and as an employer," Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986). ERISA does not prohibit "an employer from acting in accordance with its interests as an employer when not administering the plan or investing its assets." Id. Put simply, any disclosure duty found in § 1104 extends only to information about the ERISA plan or its administration, and not to general business decisions.fn2

This proposition is supported by a cursory examination of the relevant case law. In those cases where courts find that a defendant breached a duty to disclose under § 1104(a)(1), the undisclosed information directly pertains either to the administration of an ERISA plan or to the plan itself. See, e.g., Krohn v. Huron Memorial Hosp,, 1.73 F.3d 542., 549-50 (6th Cir. 1999) (finding that plan administrator breached its fiduciary duty when it failed to inform plan participant of her entitlement to long term disability benefits); Drennan, 977 F .2d at 252 (finding that the defendant breached their fiduciary duty by failing to disclose information about a new benefits plan); see also Young v. Washington Gas Light Co., 206 F.3d 1200, 1204 (D.C. Cir. 2000) ("There is nothing in the [§ 11041 to suggest that an ERISA plan administrator has a fiduciary duty to disclose information unrelated to the plan even if an employee might consider that information important to his decision to retire. Nor can we find any section of the statute that requires disclosures unrelated to the plan, indeed, the disclosure requirements are limited to information about the plan itself.").

Even if the court were to find that the undisclosed information (i.e., that Flexible and Dow were in merger

discussions) somehow pertained to the administration of an ERISA plan, the fact that the discussions with Dow were in their early stages obviates any disclosure duty. See Pocchia v. Nynex Corp., 81 F.3 d 275, 278 (2d Cir.. 1996) (holding that a fiduciary is not obligated under § 1104 to disclose internal deliberations about a proposed change in an ERISA plan); Drennan, 977 F.2d at 251 (noting that § 1104 does not require a fiduciary to "disclose its internal deliberations nor interfere with the substantive aspects of the bargaining process"); Stanton v. Gulf Oil Corp., 792 F.2d 432, 435 (4th Cir. 1986) (same).

Finally, the court is unconvinced by Plaintiff's reliance on Hamilton v. Allen-Bradley Co., Inc., 244 F.3d 819 (11th Cir. 2001). In that case, the plaintiff suffered a debilitating injury which prevented her from performing her. Id at 822. The plaintiff contacted the human resources director about applying for long term disability under the company's ERISA plan. Id. The company's human resources director repeatedly refused to give the plaintiff the forms necessary to apply for benefits, refused to tell the plaintiff the name of the insurer, and refused to notify the insurer that the plaintiff was trying to apply for long term disability. Id. This persisted for two years, and when the plaintiff finally gained access to the application forms, her claim for long term disability was dismissed as untimely. Id. On appeal, the defendant argued that it was under no fiduciary duty to disclose information to the plaintiff about how to bring her disability claim. Id. at 827. The court disagreed, and found that a fiduciary has a duty to provide complete and accurate information in response to participants' requests. Id.

Hamilton is clearly distinguishable on two grounds. First, unlike the instant case, the undisclosed information in Hamilton directly related to the ERISA plan itself. The human resources director there actively withheld the application forms from the plaintiff. Here, plaintiff has never alleged the Defendants somehow prohibited him from exercising his put option or any other benefit afforded to him under the ESOP. Second, the plaintiff in Hamilton repeatedly requested the relevant information. In concluding that the defendant breached its fiduciary duty, the Court stated that its holding was based on "[p]recedent [stating] that a fiduciary must give complete and accurate information in response to participants' questions.'" Id. (quoting Drennan, 977 F.2d at 251). The court finds that Hamilton does not support the proposition that Defendants were obligated, sua sponte and without a request from Plaintiff, to provide him with information concerning an undeveloped business decision unrelated to the administration of an ERISA plan.

Plaintiff's last claim, raised for the first time in his response to Defendants' motion for summary judgment, is equally meritless. Plaintiff alleges that when he and Wayne York, Flexible's Vice President Corporate Comptroller, met on October 5, 1999 to discuss the terms of the ESOP, York told Plaintiff that he was obligated to exercise his put option immediately. Plaintiff argues that this statement misrepresented the actual terms of the ESOP, and that but for this Misrepresentation, he would have retained his stock and could have benefitted from the merger with Dow. This claim is simply not supported by Plaintiff's own testimony. In his deposition, Plaintiff was asked whether he discussed his ESOP shares with York on

October 5, 1999. He responded, "I don't recall having any detailed conversation." Depo. of Ervast at 78. When asked whether he remembered any of the substance of his meeting with York, he stated, "I was given the impression that this [form authorizing the exercise of Plaintiff's put option] was to be signed and executed at that time." Id.

This is simply insufficient to support a claim that York misrepresented the terms of the put option to Plaintiff. As Defendants point out, Plaintiff-never states what, if anything, "York said that lead to Plaintiff's impression that he was obligated to exercise his put option on October 5, 1999. Furthermore, Plaintiff also testifies that no one ever misrepresented the terms of the ESOP to him. When asked specifically whether anyone ever promised him.

III. CONCLUSION

For the above-mentioned reasons, the court finds that Plaintiff's claim under ERISA fails as a matter of law. Accordingly, Plaintiffs motion for partial summary judgment [59-1] is hereby DENIED, and Defendants' motion for summary judgment [57 1] is GRANTED.

SO ORDERED this 24th day of September 2002,

J. GWEN FORESTER
UNITED STATES DISTRICT JUDGE

Footnotes

fn1Although Plaintiff, argues that this fact is disputed, the court takes this fact directly from the terms of the

ESOP itself. See Defs.' Mot. for Summ, J., ex 13 at 27.

fn2This conclusion is supported by the legislative history of ERISA. As the Second Circuit noted, "Congress's main purpose in imposing a disclosure requirement on ERISA fiduciaries was to ensure that 'employees [would have] sufficient information and data to enable them to know whether the plan was financially sound and being administered as intended.'" Pocchia, 81 F.3d at 279 (alteration in original)(quoting H.R. Rep. No. 533, 93d Cong., 2d Sess. VI (1974)). Contrary to Plaintiffs view, the purpose of ERISA is not to allow plan participants to gain access to strategic business negotiations so that they might maximize the value of their plan assets.

Filed 11/06/2001

Civil Action No. 1:01-CV-0564-JOF

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

ROGER ERVAST,
Plaintiff,

versus

FLEXIBLE PRODUCTS COMPANY, RANDY PETERSON, DOUG CRUICKSHANK,
Defendants.

ORDER

This matter is before the court on Plaintiffs motion to remand [29] and Defendants' motion to file a sur-response to Plaintiffs motion to remand [40].

Plaintiff, Roger Ervast, filed the instant suit against Defendants Flexible Products Company ("Flexible"), Randy Peterson, and Dough Cruickshank, both officers of Flexible, on June 23, 2001, in the State Court of Fulton County, Georgia. Plaintiff alleges breach of fiduciary duty and negligence resulting from Defendants' failure to disclose material information that would have affected Plaintiff's decision to sell Flexible stock, Plaintiff asserts that he was an employee of Flexible for twelve years and participated in flexible's Employee Stock Ownership Plan ("ESOP"), which gave employees the right to purchase Flexible

stock. Plaintiff asserts that he had purchased almost two thousand shares of Flexible stock by October 1999, when he announced his intention to resign from Flexible.

Upon his resignation, flexible bought back Plaintiff's Flexible stock and paid him the value of his shares. Plaintiff asserts that, unbeknownst to hint, Dow Polyurethane ("Dow"), a business group of Dow Chemical Company, had been negotiating with Flexible to acquire the company. Dow subsequently acquired Flexible on January 11, 2000, and Plaintiff contends that Flexible's stock price rose as a result. Plaintiff contends that Defendants had a fiduciary obligation to inform him of the potential merger, and that but for this failure to inform hire, Plaintiff would not have resigned when he did and would have retained his Flexible stock.

Defendants removed the case to federal court on February 28, 2001 on the grounds that Plaintiff's claim was preempted by ERISA, 29 U.S.C. §1001, et seq. Defendants argued that the ESOP referred to in Plaintiffs complaint was maintained for the purpose of providing ERISA regulated benefits, and that, as a result, Plaintiff's claim related to an employee benefit plan, rendering it preempted by federal law. Plaintiff filed the instant motion to remand on July 18, 2001, arguing that the court lacks subject matter jurisdiction over the case. Because Plaintiffs motion was filed after thirty days, the court will only consider the question of whether it has subject matter jurisdiction over Plaintiff's claim. 28 U.S.C. §1447(c).

Plaintiffs claims are for state law negligence and breach

of fiduciary duty, and there does not appear to be any diversity between the parties. Accordingly, the court finds that it will only have subject matter jurisdiction over Plaintiffs claims if the provisions of ERISA preempt the state law claims. In his motion to remand, Plaintiff argues that his claims are for state law violations and are unrelated to the ERISA administered ESOP. Plaintiff contends that while he bought stock through the company's ESOP, his claim is not based on the administration of the ESOP or a denial of any benefits under the ESOP, and is therefore ultimately unrelated to the plan itself. Defendants counter that Plaintiff's claim ultimately centers around stock purchased through an ERISA plan, and that Plaintiff's claim is, in reality, a claim for additional ERISA benefits.

ERISA provisions expressly preempt all state laws to the extent that they "relate to any employee benefit plan" covered by the Act. 29 U.S.C. § 1144(a). A state law "relates to" an ERISA benefit plan if it "has a connection with or reference to such a plan." New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995) (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983)). The Eleventh Circuit has further defined this standard, stating that "a party's state law claim 'relates to' an ERISA preemption whenever the alleged conduct at issue is intertwined with the refusal to pay benefits." Garren v. John Hancock Mutual Life Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997).

Where a plaintiff's state law claim would obligate a court to examine or refer to the terms of a benefit plan in order to determine the merits of the case, the

Eleventh Circuit has held that ERISA preemption is proper. See Hall v. Blue Cross/Blue Shield of Alabama, 134 F.3d 1063, 1065 (11th Cir.1998) (finding ERISA preemption because "[u]ltimately, no court will be able to determine whether [the plaintiff] has been fraudulently induced without resorting to the written policy . . .") (emphasis omitted); Franklin v. HG of Gadsen, Inc., 127 F.3d 1024, 1029 (11th Cir. 1997) (finding that even though plaintiff brought state law fraud claims, ERISA provisions preempted because "[t]he determination of the merits of appellants' state law claim will require a court to compare the benefits available under the ERISA plans provided by [the defendant] with those provided to its employees by [a former employer]"). Accordingly, if the court finds that it must reference or refer to the ESOP in order to reach the merits of Plaintiff's claim, then ERISA provisions preempt Plaintiff's state law chorus, and the court has proper subject matter jurisdiction in this case.

Plaintiffs claim is arguably distinct from the above-mentioned cases. Unlike those cases, Plaintiff is not asking the court to examine the terms of an ERISA plan to determine whether a plan administrator properly or improperly denied him benefits. Rather, Plaintiff asserts that his suit is based solely on Defendants' failure to inform him of the impending Dow merger, and that the only nexus with ERISA is the fact that the ESOP was the means by which Plaintiff purchased his stock. Plaintiff contends that a court could adjudicate the merits of the case without referring to the terms of the ESOP, thereby precluding ERISA preemption. The court disagrees. While the question of whether Defendants breached their fiduciary duty could be reached without referring to the

ESOP, the court finds that it could not address the issue of the value of Plaintiff's stock without referring to the terms of the ESOP. Flexible is a closely-held corporation, and Flexible's stock is not publicly traded.

When an ESOP participant wishes to terminate his employment, he may exercise a "put option," which requires the company to purchase back the shares of Flexible stock held in the participant's account. Because the shares are not publicly traded, the company itself must determine a price for the shares. Article 7.5(b) of the ESOP sets forth the means by which the company determines the proper purchase price to be paid for a participant's Flexible stock.

In his complaint, Plaintiff alleges that "[t]he price given by Flexible to [Plaintiff] for his interest in the options and ESOP was less than the value of the options and ESOP in light of the Dow negotiations and subsequent purchase." Pl.'s Compl. 115. In other words, while Plaintiff's cause of action stems from Defendants' allegedly unrelated tortious conduct, Plaintiffs claim ultimately revolves around the price Flexible paid him for his company stock. As a closely-held corporation, the method by which Flexible stock is valued lies within the terms of the ESOP. In short, irrespective of whether Defendants breached their fiduciary duty to Plaintiff by not informing him of the impending Dow merger, the court would ultimately be unable to analyze the value of the Flexible stock without looking at the terms of the ESOP. Under Eleventh Circuit precedent, if a court is obligated to refer to the terms of an ERISA plan in order to adjudicate the case, ERISA provisions preempt the state law claims. See Hall, 134 F.3d at 1066. Because the court would be unable to analyze the

value of flexible stock without referring to the terms of the ESOP, the court finds that Plaintiff's state law negligence and breach of fiduciary duty claims are related to Defendants' administration of an ERISA plan and, as such, are preempted. As Plaintiff's claims are controlled by 29 U.S.C. § 1001, et seq., Plaintiff has presented a federal. question, and subject matter jurisdiction is proper under 28 U.S.C. § 1331.

Accordingly, Plaintiff's motion to remand [29-1] is DENIED. Defendant's motion to file a sur-response to Plaintiff's motion to remand [40-1] is DENIED AS MOOT.

Having denied Plaintiff's motion to remand, the court turns to the Plaintiff's motions to compel [27-1, 34-1], for attorney's fees [27-2, 34-2], and Plaintiffs motion to extend discovery [31-1], as well as Defendants' motion for protective order [15-1], motion to quash [15-2] and motion to extend time for summary judgment motions [35-1]. This court believes that a conference on the aforementioned discovery-related motions will facilitate disposition. Accordingly, the motions will be considered at a discovery conference to be held before the undersigned in Chambers, Room 1921 of the United States Courthouse, on Wednesday, November 21 at 3:00p.m. Ruling on the above discovery motions will be DEFERRED until that time.

SO ORDERED this 2nd day of November, 2001.

J. OWEN FORESTER
UNITED STATES DISTRICT JUDGE

Filed 12/11/03

No. 02-15769, No. 02-15941

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROGER ERVAST,
Plaintiff-Appellant,

versus

FLEXIBLE PRODUCTS COMPANY, RANDY PETERSON, DOUG CRUICKSHANK,
Defendants-Appellees.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: BIRCH and MULL, Circuit Judges, and EDENFIELD*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

/s/ Stanley F. Birch
UNITED STATES CIRCUIT JUDGE
ENTERED FOR THE COURT:

*Honorable D. Avant Edenfield, United States District

Judge for the Southern District of Georgia, sitting by designation.

Section 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title (FOOTNOTE 1) or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

(FOOTNOTE 1) So in original. Probably should be "subtitle".

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) (FOOTNOTE 2) of title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if -

(FOOTNOTE 2) See References in Text note below.

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191b(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 (FOOTNOTE 2) of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a

day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4)

(FOOTNOTE 2) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section

1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) (FOOTNOTE 2) of title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability

against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section

1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan -

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of -

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a

participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under

this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of -

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) -

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection

(a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary

determines in writing that -

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the

plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

(m) Penalty for improper distribution

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.

(2)

Supreme Court, U.S.
FILED
JUN 2 2 2004
OFFICE OF THE CLERK

No. 03-1240

IN THE

Supreme Court of the United States

FLEXIBLE PRODUCTS COMPANY, RANDY PETERSON, DOUG CRUICKSHANK,

Petitioners,

v.

ROGER ERVAST,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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June 2004

BEST AVAILABLE COPY

QUESTION PRESENTED

Does ERISA "completely preempt" a state-law based tort claim that majority shareholders breached a fiduciary duty to provide material information to a minority shareholder simply because the minority shareholder acquired his stock ownership interest through an ERISA plan?

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INTRODUCTION

In this case, the United States Court of Appeals for the Eleventh Circuit, applying the "complete preemption" test of *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58 (1987), held that ERISA does not "completely preempt" a state-law claim that a majority shareholder breached a fiduciary duty to a minority shareholder by concealing material information about a planned merger, with the result that the minority shareholder disposed of his holdings for far less than the real value of the shares. Petitioners identify no other decision of a court of appeals that has decided this question, let alone reached a contrary holding on it. And they acknowledge that the Eleventh Circuit's decision is consistent with that of the only other court of appeals that has addressed the application of the complete preemption doctrine to a similar claim. *See Husvar v. Rapoport*, 337 F.3d 603 (6th Cir. 2003). Because the extremely fact-specific issue presented has so far arisen in only one federal appellate decision and is not the subject of any disagreement among the circuits, there is no need for this Court to reach out to address it.

Petitioners nonetheless argue that the case presents a variety of doctrinal conflicts among the circuits. But most of the supposed "conflicts" involve issues that were either not raised in or not actually decided by the court below, and the rest amount at most to abstract and insubstantial differences in the way different circuits have worded their opinions. None of these supposed "conflicts" merits a grant of certiorari, particularly insofar as they involve issues that were not considered below and are not dispositive of this case.

Finally, to the extent that there may have been any need for guidance to the lower courts on the scope of the "complete preemption" doctrine, this Court has recently provided it in its decision in *Aetna Health Inc. v. Davila*, No. 02-1845 (U.S. June 21, 2004). Even if there were minor variations in the ways different circuits had articulated their abstract "tests" for complete preemption under ERISA before *Davila*,

there is no need to grant certiorari now in light of the additional guidance *Davila* provides. Nor is there any need to vacate the judgment below and remand this case for further consideration in light of *Davila*'s holding that claims that require interpretation of the terms of an ERISA plan and that are premised on legal duties derived from the defendants' roles with respect to an ERISA plan are completely preempted. That holding does not in any way call into question the correctness of the Eleventh Circuit's holding that the very different claims at issue in this factbound case are not completely preempted because, among other things, they do not seek to enforce or interpret the terms of an ERISA plan and are premised on legal duties that exist independently of an ERISA plan. Indeed, *Davila* confirms that the way the Eleventh Circuit analyzed the complete preemption issue was correct.

STATEMENT OF THE CASE

Until October 1999, respondent Roger Ervast was an employee of petitioner Flexible Products Company. Although Flexible's stock was not publicly traded, employees could acquire ownership interests in Flexible stock under an employee stock ownership plan, through which shares were held in trust for their benefit. When an employee left the company, he would receive a distribution reflecting the value of the shares held in trust for him. The valuation date depended on the date the departing employee exercised a "put" option for his shares.

Over the course of his employment with Flexible, Mr. Ervast accumulated holdings of Flexible stock worth several hundred thousand dollars under the employee stock ownership plan. On October 4, 1999, Mr. Ervast submitted two weeks' notice of his resignation from Flexible. Flexible responded by terminating him immediately. Mr. Ervast then exercised his "put option" and received payment for his shares in the second week of October.

Meanwhile, unbeknownst to Mr. Ervast, Flexible and its management had begun negotiations aimed at selling the company to Dow Chemical Company. By early October, negotiations had reached an advanced stage, and a price was agreed upon by October 26. The merger was consummated in January 2000. As a result of the merger, all Flexible employees who had exercised put options under the employee stock ownership plan after October 26, 1999, received a higher price for their stock based on the price paid by Dow. At no time before Mr. Ervast exercised his put option was he given any information about the proposed merger, and, as a result, he cashed in his holdings at a time when the amount he realized was substantially lower than it would have been had he known what was known by the insiders — namely, that there were material developments affecting the value of his stock.[1]

In January 2001, Mr. Ervast filed suit against Flexible and two individual defendants in a Georgia state court, alleging that the defendants had breached fiduciary duties they owed him as a minority shareholder under state law by failing to disclose material information affecting the timing of his decision to liquidate his stock holdings. The defendants removed the action to the United States District Court for the Northern District of Georgia, claiming that the case arose under federal law because Mr. Ervast's state-law claims were completely preempted by remedies available under ERISA § 502(a). Agreeing with the defendants, the district court denied Mr. Ervast's motion to remand, and later entered summary judgment against Mr. Ervast.

Mr. Ervast appealed, and the Eleventh Circuit reversed. The court recognized that under this Court's decision in *Metropolitan Life*, a claim invoking state law is subject to "complete preemption" and thus deemed to arise under federal law

---

[1] On October 1, 1999, two insiders renegotiated their compensation to call for significant payouts upon a change in control of Flexible.

if it seeks relief that "falls within the scope of" ERISA § 502(a). In that instance, the court acknowledged, "a plaintiff's state law claims filed in state court are 'necessarily federal in character' and removable based on federal question jurisdiction." *Ervast v. Flexible Products Co.*, 346 F.3d 1007, 1012 (11th Cir. 2003).

At the same time, the court pointed out that not every case involving the existence of an ERISA plan is "automatically subject ... to federal question jurisdiction." 346 F.3d at 1014. Rather, a claim is completely preempted when it involves an ERISA plan, a proper ERISA plaintiff, an ERISA entity as a defendant, and seeks relief "akin to that available" under ERISA § 502(a). *Id.* at 1013. Here, the court concluded, Mr. Ervast's claims were not akin to claims under § 502(a) because they did not seek to recover benefits due under the plan, to enforce any other rights under the plan, or to clarify rights to future benefits under the plan (*id.* at 1014), nor were the claims based upon fiduciary duties that existed by virtue of the plaintiff's and defendants' relationship to a plan. *Id.* at 1016. Rather, as the court put it, Mr. Ervast "claims a right to information that, if he possessed [it], would have changed his decision making process with regard to the time he sought to collect his benefits. Ervast also does not claim entitlement to this information under the terms of the ESOP; rather, his claim is based on his status as minority shareholder and the duty owed him by the majority shareholders." *Id.* at 1015.

Thus, the court concluded, "[w]e are not confronted with an 'artful pleader' that has found a way around ERISA preemption by couching the terms of his claim for benefits in a creative way." *Id.* at 1016. Mr. Ervast, instead, was making a claim that was in essence a claim under Georgia principles of corporate law, not an "ERISA civil action for the recovery of benefits." *Id.* at 1017. Hence the claim was not subject to complete preemption; did not arise under federal law; and was not removable. Accordingly, the court reversed and re-

manded to the district court with instructions to grant Mr. Ervast's motion to remand the action to the Georgia state court where it was originally filed.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among the Circuits Over Whether ERISA "Completely Preempts" State-Law Claims That a Majority Shareholder Violated a Fiduciary Duty to a Minority Shareholder by Concealing Information Material to the Minority Shareholder's Decision to Dispose of His Shares.

The Eleventh Circuit's decision in this case addressed the application of complete preemption under ERISA to a narrow and extremely fact-specific set of circumstances. Respondent Roger Ervast invoked Georgia tort law in a Georgia state court, seeking recovery for a breach of fiduciary duty that resulted in his disposition of his stock holdings in Flexible for a value lower than he would have realized had he been properly informed of Flexible's planned merger. The sole issue decided by the Eleventh Circuit was whether this specific claim was removable on the theory that, although framed as a state-law claim, it actually arose under federal law because ERISA completely preempts and supplants all state-law claims for such relief.

Acknowledging this Court's holding in *Metropolitan Life* that claims that are "within the scope of § 502(a)" of ERISA are completely preempted, 481 U.S. at 64, the Eleventh Circuit held that Mr. Ervast's claim was not subject to complete preemption because it was not "within the scope of § 502(a)." The court concluded that Mr. Ervast "did not seek 'compensatory relief akin to that under'" § 502, 346 F.3d at 1014, because, among other things, his claim was not one for benefits due under an ERISA plan, did not depend on the construction or enforcement of the terms of an ERISA plan, and did not seek to enforce duties premised on the existence of a plan or on the defendants' roles in relation to a plan. *Id.*

at 1014-16. Observing that the mere "presence of an ERISA plan within the facts of a case does not, on its own, automatically subject the litigant to federal question jurisdiction," *id.* at 1014, the court held that the complete lack of congruence between Mr. Ervast's claim and a claim under ERISA § 502(a) precluded any finding the Mr. Ervast was actually asserting a civil action under ERISA. *Id.* at 1017. Hence there was no complete preemption and no federal jurisdiction.

The Eleventh Circuit's factbound application of *Metropolitan Life* to the particular allegations of Mr. Ervast's complaint does not conflict with the holding of any other federal court of appeals. Indeed, petitioners do not even contend that there is a conflict over complete preemption of such claims of breach of duty by majority or controlling shareholders, *and they identify no other federal appellate cases that even address this specific issue.*

Moreover, by petitioners' own account, the opinion in the one other federal appellate case that comes the closest to addressing the narrow issue presented here, *Husvar v. Rapoport*, 337 F.3d 603 (6th Cir. 2003), is fully consistent with the holding of the Eleventh Circuit in this case. In *Husvar*, plaintiffs who were minority shareholders by virtue of an employee stock ownership plan covered by ERISA claimed that the defendants (who were majority or controlling shareholders) had breached state-law fiduciary duties by mismanaging the corporation while at the same time paying themselves sizeable bonuses, resulting in the destruction of the value of the minority shareholders' stock. The defendants removed the case, arguing that the claims were completely preempted by ERISA.

The Sixth Circuit in *Husvar*, like the Eleventh Circuit in this case, held that such a claim of breach of fiduciary duty was not within the scope of ERISA § 502 under the reasoning of *Metropolitan Life* because the "real nature" of the claim was not federal. The court noted that the plaintiffs were

not seeking to enforce fiduciary duties that arose because of the existence of an ERISA plan, nor were they seeking to enforce the terms of the plan or recover benefits under it. Like the Eleventh Circuit, the Sixth Circuit held that the mere fact that the value of shares acquired through an ERISA plan was at issue "does not transform a state-law breach of fiduciary duty claim into a federal ERISA action." 337 F.3d at 608. Thus, the court concluded, the plaintiffs' "filing contains no claims arising under federal law," *id.* at 609, and was not removable.

Oddly, petitioners invoke the Sixth Circuit's ruling in *Husvar* as a reason this Court should grant certiorari, even though they acknowledge that it did not address the same issue and that its reasoning is fully consistent with that of the Eleventh Circuit to the extent the issues in the two cases are similar. Pet. 6. But consistency among rulings of the federal appellate courts is a strong reason for *denying* certiorari, not granting it.

Moreover, although not cited by petitioners, the Ninth Circuit's decision in *Abraham v. Norcal Waste Systems,* 265 F.3d 811 (9th Cir. 2001), also addressed similar issues of breaches of corporate duties affecting the value of shares held under an employee stock ownership plan, and similarly held that the plaintiffs' claims were not completely preempted "because those claims are based upon rights that arise under state law in their capacity as former shareholders ... and current note holders ..., not upon any rights that are conferred, enforced, or governed by ERISA (nor upon a violation of the terms of a plan)." *Id.* at 824. *Abraham* further illustrates the absence of any relevant disagreement among the circuits over the issue presented here.

In addition, petitioners' inability to identify any other federal appellate cases that actually decided the precise issue in this case, and their identification of only one other decision that is even similar, weighs strongly against their assertion that the question presented is important enough to merit

a grant of certiorari. That the issue has so far reached only one court of appeals hardly suggests that it will recur so often that this Court's immediate guidance on it is necessary. Should the issue arise more frequently in the future, and should it generate some actual disagreement among the circuits, there will be ample time for this Court to address it. Until then, the Court should commit its scarce resources elsewhere.

II. The Supposed Doctrinal Conflicts on Which Petitioners Rely Either Do Not Exist or Are Not Presented by This Case.

Unable to identify a genuine split of authority on the question actually presented, petitioners assert that this case presents a number of abstract doctrinal conflicts over the standard for complete preemption under ERISA. Petitioners adopt a kitchen-sink approach, identifying as many issues as they can where some question regarding complete preemption is unresolved or where courts have used different words in articulating some aspect of the complete preemption doctrine, and then asserting that this case presents those issues, regardless of whether petitioners bothered to raise them below. In every case, however, either there is no genuine conflict among the circuits, or no holding in the court below on the issue, or — in most instances — both.

A. There Is No Relevant Split Among the Circuits Over the General Standard for Complete Preemption.

Petitioners begin at the most abstract level, asserting that the Eleventh Circuit's overall standard for complete preemption under ERISA, which was articulated in *Butero v. Royal Maccabees Life Insurance Co.*, 174 F.3d 1207 (11th Cir. 1999), and applied by the court to Mr. Ervast's claims, conflicts with the standards applied by other circuits. Pet. 8-9. As petitioners summarize the Eleventh Circuit standard, it involves an inquiry into whether (1) there is a relevant ERISA plan, (2) there is a plaintiff who has standing to sue under

ERISA, (3) there is a defendant that is an ERISA entity, and (4) the plaintiff seeks relief that is "akin to" that available under ERISA § 502(a).

Petitioners acknowledge that the Eleventh Circuit's standard is similar to that devised by the Seventh Circuit in *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1487 (7th Cir. 1996), but assert that both the standard applied below and the standard set forth in *Jass* conflict in principle with the more "straightforward" approach of other circuits, which turns on whether a state-law claim is "an alternative means of vindicating the rights protected by § 502(a)." Pet. 9-10. Petitioners cite *Cicio v. Does*, 321 F.3d 83, 94 (2d Cir. 2003), *pet. for cert. pending sub nom. Vytra Healthcare v. Cicio*, No. 03-69, as exemplifying their preferred approach.[2]

Petitioners, however, are in no position to challenge the Eleventh Circuit's *Butero* standard in this Court because they never asserted in the court below that the standard was incorrect. Rather, in their principal brief on the merits, they endorsed the *Butero* standard and argued only that Mr. Ervast's claims were preempted under it. App. Br. 12. Even if their failure to raise the point before the panel could be excused on the theory that *Butero* was controlling, petitioners were at least obliged to raise the issue when they sought rehearing en banc. But not even in their rehearing petition did they assert that the *Butero* standard improperly interpreted *Metropolitan Life* or conflicted with precedents of other circuits; rather, they endorsed *Butero* as supplying the "correct inquiry" and argued that the panel opinion was inconsistent with *Butero*. Pet. for Reh. and Reh. En Banc 3-4, 7. Of course, "[w]here

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[2] Petitioners also note that the circuits were in disagreement over whether a showing of conflict preemption under ERISA § 514 is a necessary part of the "complete preemption" test. Pet. 10 n.4. This Court's decision in *Davila*, however, resolves this conflict by clarifying (consistent with the Eleventh Circuit's ruling below) that complete preemption under § 502(a) does not require § 514(a) preemption. *Davila*, slip op. at 12 n.4.

issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001). Having failed to afford the Eleventh Circuit the chance to consider their broad-brush claim that the *Butero* standard is improper, petitioners cannot raise it now.

In any event, petitioners' assertion that the Eleventh Circuit's *Butero* standard conflicts with the Second Circuit's formulation of the complete preemption doctrine in *Cicio* is thoroughly unpersuasive. *Cicio*'s inquiry into whether a state claim seeks to "vindicate rights already protected by § 502(a)" (321 F.3d at 94) is, at least in the abstract, not meaningfully different from (and certainly not appreciably broader than) the Eleventh Circuit's inquiry into whether the state claim is "akin to" a claim under § 502(a). Both inquiries turn to a significant degree on whether the claim seeks recovery of benefits due under the plan, enforcement of rights under the plan, or clarification of entitlement to future benefits under the plan. *Compare Cicio,* 321 F.3d at 94, *with Ervast*, 346 F.3d at 1014. On the broad level of generality at which petitioners present the issue, there is no genuine conflict.

To be sure, the Second Circuit in *Cicio* did apply its test to reach a *result* apparently at odds with the result reached by the Seventh Circuit in *Jass*.[3] But any conflict between the Second and Seventh Circuits on the application of the general standard to the specific issues presented in *Cicio* and *Jass*

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[3] Ironically, and further evincing the fundamentally misguided nature of their petition for certiorari, petitioners claim to prefer the Second Circuit's standard over the Seventh Circuit's even though the Second Circuit found *no* complete preemption in *Cicio* while the Seventh Circuit found a similar claim completely preempted in *Jass*. This anomaly underscores that the general formulations on which petitioners focus their attention are less significant than the application of the tests to concrete facts.

hardly calls for a grant of certiorari *here*. The issue in *Cicio* and *Jass* — whether claims challenging medical coverage decisions are preempted — is completely different from the issue here. That the Second and Seventh Circuits disagreed over complete preemption of those claims in no way suggests that either of those circuits would disagree with the Eleventh Circuit over whether the very different claim at issue here is completely preempted. In any event, the medical coverage issue has just been resolved by this Court in *Davila*, so any disagreement between *Jass* and *Cicio* now appears moot.

B. The Eleventh Circuit Did Not Limit Complete Preemption Solely to Claims Expressly Based on the Terms of an ERISA Plan.

At a slightly lower level of generality, petitioners contend that the Eleventh Circuit in this case limited complete preemption to claims that are expressly based on the terms of an ERISA plan, in conflict with decisions of other courts of appeals. In fact, however, the Eleventh Circuit did no such thing, and its decision does not conflict in any way with the decisions petitioners cite.

Although petitioners contend that the linchpin of the Eleventh Circuit's opinion was that Mr. Ervast's claims were not based on the terms of the plan (Pet. 11), the opinion nowhere states that complete preemption always and in all circumstances depends on whether a claim seeks to enforce or requires interpretation of the terms of a plan. Rather, the opinion says that a claim that seeks "relief akin to that available under" § 502(a) will "often" — not always — be "a claim for benefits due under a plan." 346 F.3d at 1013. Consistently with other federal appellate opinions, including those cited by petitioners, the Eleventh Circuit considered whether the claims were dependent on the terms of the plan as an important factor, but not the exclusive factor, in determining whether the claims were completely preempted. In this respect, the Eleventh Circuit's approach anticipated that of this Court in *Davila*, where it was critical to the Court's

finding of complete preemption that "interpretation of the terms of respondents' benefit plans forms an essential part of their [state-law] claim ...." *Davila*, slip op. at 11.

Here, the Eleventh Circuit focused primarily on whether Mr. Ervast's complaint sought relief due under the plan *not* because it thought that was the *sine qua non* for complete preemption, but because that had been "what the district court construed Ervast's state law claim to be seeking." 346 F.3d at 1015. Significantly, however, the court also considered whether the claims were completely preempted because they invoked ERISA fiduciary duties, and concluded that they did not — an inquiry that would be unnecessary if, as petitioners contend, the court had held that only claims seeking to enforce the express terms of the plan were preempted. *See* 346 F.3d at 1016.[4]

Petitioners do not help their case by citing decisions holding that claims of retaliatory discharge based on the exercise of ERISA rights are completely preempted (*see, e.g., Wood v. Prudential Ins. Co.*, 207 F.3d 674, 678 (3d Cir. 2000); *Felton v. Unisource Corp.*, 940 F.2d 503 (9th Cir. 1991)), because nothing in the Eleventh Circuit's opinion conflicts with those decisions. Courts that have held such claims preempted have based their holdings on the fact that ERISA § 510, which is enforceable through § 502(a), expressly creates a remedy for retaliation and other actions based on "benefits-defeating" motives; thus, they reason, a similar state-law retaliation claim "falls within Section 510" and "is necessarily within Section 502." *See Wood*, 207 F.3d at 677; *see also Ingersoll-Rand Co. v. McLendon*, 498 U.S. 133, 144-45 (1990) (hold-

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[4] Petitioners also contend that the Seventh Circuit in *Jass* held that complete preemption is available only for claims that require an interpretation of an ERISA plan. Pet. 12 (citing *Jass*, 88 F.3d at 1487). That appears to be an exaggeration of the cited portion of the *Jass* opinion, but even if it were not, it does not support a grant of certiorari here, since the Eleventh Circuit held no such thing.

ing that § 502(a) provides exclusive remedy for rights guaranteed under § 510). Mr. Ervast's complaint did not involve any such claim, and the Eleventh Circuit was not called upon to, and did not, express any view on whether claims of wrongful discharge based on benefits-defeating motives were completely preempted.[5]

C. The Eleventh Circuit Did Not Limit Complete Preemption to Claims Within the Scope of Subpart (a)(1)(B) of ERISA § 502.

Petitioners also ask this Court to use this case to determine whether ERISA complete preemption is limited to claims within the scope of ERISA § 502(a)(1)(B) or whether it extends to other subparts of § 502(a) as well, as other courts of appeals have held. But this case is not the one in which to resolve that issue (assuming it needs resolving) because the Eleventh Circuit did not address it, far less decide it in conflict with the decisions of other courts of appeals. Resolution of the issue by this Court can await the day when some court of appeals actually addresses it and decides it differently from the cases petitioners cite.

Unable to point to any statement in the Eleventh Circuit's opinion limiting complete preemption to § 502(a)(1)(B), petitioners simply speculate that the Eleventh Circuit must have "assumed" that complete preemption applied only to § 502(a)(1)(B). Pet. 12. They base their speculation on the fact that the Eleventh Circuit *did not address* complete preemption under any other subpart of § 502(a), even though, they say, it *should* have. Pet. 13. They then assert that by failing to address the issue, the Eleventh Circuit somehow "ex-

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[5] Petitioners' assertion that there is a conflict with the Sixth Circuit's decision in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999), is even more mystifying, because the Sixth Circuit expressly characterized the claims there as involving the placement of state-law labels on claims for "recovery of benefits." 170 F.3d at 614.

pressly limited" (Pet. 13) complete preemption to claims within the scope of § 502(a)(1)(B).

Of course, *not addressing* whether complete preemption is available under other subparts of § 502(a) is not the same thing as "expressly limiting" complete preemption to subpart (a)(1)(B). Petitioners' real complaint is not that the Eleventh Circuit *decided* an issue in conflict with the decisions of other circuits, but that it *didn't reach* an issue they think it should have resolved. Moreover, the Eleventh Circuit's silence on the issue in this case can hardly be taken as an indication that it thinks complete preemption is limited to § 502(a)(1)(B), given that another recent opinion of the same court, *Land v. CIGNA Healthcare of Florida*, 339 F.3d 1286 (11th Cir. 2003), *pet. for cert. pending*, No. 03-649, analyzed ERISA complete preemption not only under § 502(a)(1)(B) but also under § 502(a)(2).

Thus, the Eleventh Circuit's exclusive focus on § 502(a)(1)(B) in this case suggests no more than that the panel understood that that was the only issue before it. And the panel presumably had that understanding because *that was the only basis petitioners asserted in their brief for complete preemption*. Specifically, petitioners' principal brief argued that Mr. Ervast's claim was "'akin' to a claim for benefits under § 1132(a)(1)(B)," App. Br. 17, but never asserted that it was akin to a claim under any other subpart of § 502(a). The Eleventh Circuit panel cannot be faulted for failing to address an argument petitioners did not make in their brief and, indeed, tacitly discarded.

Even if there were a basis for contending that the Eleventh Circuit somehow should have divined that petitioners wanted it to consider complete preemption under subparts of § 502(a) that they neglected to cite, such an argument would not merit this Court's review. This Court does not sit to police determinations by the courts of appeals about what issues need to be addressed in their opinions.

D. Petitioners' Semantic Disagreement with the Eleventh Circuit's Use of the Words "Akin to" Presents No Issue Worthy of Review.

Objecting to the Eleventh Circuit's use of the term "akin to" to describe those state-law claims that are subject to complete preemption under ERISA, petitioners request this Court to grant certiorari to determine whether complete preemption is limited to claims "analogous" to claims under § 502(a). Petitioners contend that any such limitation is inconsistent with *Metropolitan Life*'s holding that claims "within the scope of" § 502(a) are completely preempted.

Once again, petitioners seek review of an issue they never raised below. Both in their brief on the merits and their petition for rehearing en banc, petitioners consistently asserted that Mr. Ervast's claim was "akin to" a claim under § 502(a), and never once even suggested that this was not the proper inquiry. Appellees' Br. 16-17; Pet. for Reh. and Reh. En Banc 7.

Even if petitioners had preserved this issue for review, their argument that there is a split in authority meriting review is not only purely semantic, but also extremely unpersuasive. Petitioners do not explain what the difference is between "akin to," "analogous to," and "within the scope of," or how any possible difference would be outcome determinative in this case. Indeed, if anything, "akin to" and "analogous to" would seem to be *broader* terms than "within the scope of," and it is simply nonsensical to assert that a claim could be "within the scope of" the remedies provided by § 502(a) without being analogous or akin to those remedies in some way. Similarly, the Eleventh Circuit's focus on whether a state-law claim is "akin to" a § 502(a) claim is fully consistent with this Court's latest exploration of the standard in *Davila*, which examines whether a state cause of action "duplicates, supplements, or supplants the ERISA civil enforcement remedy." *Davila*. slip op. at 6.

Petitioners further assert that the Eleventh Circuit's "akin to" test is inconsistent with decisions holding that claims of wrongful or retaliatory discharge to avoid payment of plan benefits are completely preempted. Pet. 14 (citing *Metropolitan Life*, *Wood*, and *Felton*). According to petitioners, such claims are "not analogous to any causes of action provided for in § 502(a)." Pet. 14. That is flatly wrong. As the Third Circuit explained in *Wood*, ERISA § 510 *expressly* provides that discharges to avoid payments of benefits are actionable under § 502(a). 207 F.3d at 677; *see also Ingersoll-Rand*, 498 U.S. at 144-45. Thus, plan-related wrongful discharge claims are *directly analogous* to causes of action provided for by § 502(a). The wrongful discharge cases cited by petitioners thus support the Eleventh Circuit's "akin to" standard.[6]

E. The Eleventh Circuit Did Not Hold That the Actual Existence of an ERISA Remedy Is a Prerequisite to Complete Preemption.

Petitioners assert that the Eleventh Circuit held in this case that complete preemption is available under ERISA only when the plaintiffs' claim, if asserted under ERISA rather than under state law, would be meritorious. This "holding" they assert, is contrary to decisions of other circuits holding that a state-law claim may be displaced under the complete preemption doctrine even when the relief the plaintiff seeks is not available under ERISA or his claim is otherwise not cognizable under ERISA. *See, e.g.*, *Wood v. Prudential*, 207 F.3d at 678-79; *Cicio v. Does*, 321 F.3d at 94.

The problem with petitioners' argument is, once again, that it relies on a "holding" nowhere to be found in the Elev-

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[6] Petitioners also contend that even if "akin to" is the correct test, the Eleventh Circuit misapplied it. The Eleventh Circuit's persuasive opinion is refutation enough of that argument, and error in applying a correct legal standard to particular facts is in any event not a ground for issuance of a writ of certiorari. S. Ct. R. 10.

enth Circuit's opinion. Petitioners rely solely on the Eleventh Circuit's passing observation that it was "telling" that ERISA did not require plan administrators to make disclosures of the type Mr. Ervast complained that the defendants had not provided. 346 F.3d. at 1015 n.8. That is far cry from a holding that the availability of an ERISA remedy is in all cases a prerequisite to complete preemption. Rather, the court's observation appears to be simply one factor in its overall determination that the nature of Mr. Ervast's claims is such that they are not "within the scope" of ERISA § 502 — and a relatively minor factor at that, given that the court relegated it to a footnote. If the court had actually intended to hold that complete preemption was foreclosed because Mr. Ervast would not have had a meritorious claim under ERISA, one would expect it would have said so. Given that the court did not say so, its decision does not present a "conflict" with the decisions petitioners cite on this point.

III. This Case Does Not Present the Question Whether ERISA Imposes Affirmative Disclosure Duties.

In a final, desperate bid for this Court's attention, petitioners ask the Court "to determine whether there is an affirmative fiduciary disclosure duty under ERISA." Pet. 18. The Court should not, and indeed cannot, do so, because that question is not determinative of any issue in this case and was not decided below.

Petitioners' assertion that this case poses the issue is based entirely on a sentence in footnote 10 of the Eleventh Circuit's opinion: "Although we conclude that the particular type of 'failure-to-inform' claim asserted by Ervast here sounds in state law and is not preempted, we *note*, however, that an ERISA participant has a right to information and that a failure-to-inform claim *may* lie against an ERISA administrator." 346 F.3d at 1016 n.10 (emphasis added). Petitioners assert that whether such a claim is viable under ERISA is an issue on which this Court previously reserved decision and over which "the circuits are deeply divided." Pet. 19.

Whether the circuits are "deeply divided" or not, this case cannot resolve their division, because the Eleventh Circuit's passing observation in its footnote was no more than *obiter dictum*. The comment obviously did not resolve any issue in this case because, as the Eleventh Circuit noted, Mr. Ervast was not asserting a failure-to-inform claim under ERISA. Thus, whether such a claim was available under ERISA was not before the court. Moreover, the court did not even purport to say definitively that an affirmative-duty-to-disclose claim *would* ever lie against an ERISA administrator, let alone define the circumstances under which it would. Rather, the court merely alluded in passing to the *possibility* that such a claim "may lie."

Black's Law Dictionary's definition of "*obiter dictum*" almost seems to have been written with the Eleventh Circuit's footnote in mind: "A remark made, or opinion expressed, by a judge, in his decision upon a cause, 'by the way,' that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument." *Black's Law Dictionary* 967 (5th ed. 1979).

Although it might go without saying that this Court does not use its certiorari jurisdiction to review dicta in the footnotes of court of appeals opinions, this Court in fact recently said so: "We sit, after all, not to correct errors in dicta; '[t]his Court reviews judgments, not statements in opinions.'" *Bunting v. Mellen*, 124 S. Ct. 1750, 1754 (2004) (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam)). Petitioners' quibbles with the Eleventh Circuit's dicta present no issue meriting this Court's attention.

IV. This Court's Decision in *Davila* Obviates Any Need for Further Guidance on Complete Preemption at This Time.

Finally, in light of this Court's recent decision in *Davila*, any suggestion that this Court should grant certiorari in an ERISA complete preemption case simply to provide further guidance on general doctrinal questions concerning the scope of the complete preemption doctrine is wholly meritless. The Court has just restated and applied the doctrine, offering new guidance on its scope that will undoubtedly assist the lower federal courts as they seek to apply it to different types of claims. Until conflicts among the circuits develop in light of *Davila*, this Court need not devote further time and attention to supplying direction to the federal courts in this area.

At the same time, nothing in the Court's decision in *Davila* remotely suggests any need to grant certiorari, vacate the judgment below and remand this case for further consideration. As noted above (*supra* at 15), the Court's articulation of the standard for complete preemption in *Davila* is fully consistent with that of the Eleventh Circuit below. Moreover, like the Eleventh Circuit below, this Court in *Davila* centered its complete preemption inquiry on two principal factors: whether the plaintiffs' claim sought benefits to which they were entitled "only because of the terms of an ERISA-regulated employee benefit plan," and whether the state-law claim seeks to enforce a "legal duty ... independent of ERISA or the plan terms." *Davila*, slip op. at 8. In *Davila*, this Court found preemption largely because the plaintiffs "complain[ed] only about denials of coverage promised under the terms of ERISA-regulated employee benefit plans," *id.* at 9, and thus their claims necessarily required interpretation of the terms of the plans. *Id.* at 10-11. In addition, the Court stressed that the relationship between the plaintiffs and defendants, and thus the only possible source of any duty, "exist[ed] here only because of [defendants'] administration of ERISA-regulated benefit plans." *Id.* at 11. Thus, the Court

found complete preemption because the plaintiffs had brought suit "only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA." *Id.* at 11-12.

Here, by contrast, as the Eleventh Circuit carefully explained, Mr. Ervast did *not* seek to rectify a wrongful denial of benefits under the plan, his claims did *not* require interpretation of the plan, and he did *not* seek to remedy violations of duties that existed by reason of the defendants' role with relation to an ERISA plan. Unlike in *Davila*, Mr. Ervast's claims require no construction of the plan, but only a mathematical valuation of interests he acquired through the plan. Moreover, in *Davila*'s terms, Mr. Ervast's claims are premised on duties that "arise independently of ERISA [and] the plan terms." *Davila*, slip op. at 10. The Eleventh Circuit's holding that Mr. Ervast's claims are not completely preempted is thus fully consistent with the principles laid down in *Davila*. Moreover, the particular issue in *Davila* — whether claims challenging medical coverage decisions are subject to complete preemption — is so different from the claim of breach of duty by a majority shareholder that is at issue in this case that the Court's disposition of *Davila* will have no conceivable effect on the Eleventh Circuit's confidence that the outcome it previously reached in this case was correct. Thus, the Court's determination with respect to complete preemption in *Davila* is not even arguably controlling here.

Moreover, the Eleventh Circuit's decision in this case contains none of the flaws this Court observed in the Fifth Circuit opinions at issue in *Davila*. The Eleventh Circuit did not, for example, hold that Mr. Ervast's claims escaped preemption merely because they were labeled tort claims as opposed to contract claims. *Cf. Davila*, slip op. at 12. Nor did the Eleventh Circuit hold that complete preemption is limited to cases where state remedies "duplicate" ERISA remedies. *Cf. id.* at 12-13. And, unlike in *Davila*, the state-law duty of

majority shareholders to minority shareholders that Mr. Ervast seeks to enforce is truly "external" to his rights under an ERISA plan. *Cf. id.* at 13.

In sum, *Davila*'s holding that a cause of action "brought to remedy only the denial of benefits under ERISA-regulated benefit plans" is subject to complete preemption (*Davila*, slip op. at 19), confirms the appropriateness of the Eleventh Circuit's analysis of the factbound issue in this case. In light of the new guidance the Court has just provided to lower courts facing ERISA complete preemption issues generally, and the absence of any genuine conflict either on the specific issue posed by this case or the broader questions that petitioners incorrectly claim it implicates, there is no reason for this Court to hear the merits of this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 03-1240

IN THE

Supreme Court of the United States

FLEXIBLE PRODUCTS COMPANY, RANDY PETERSON, DOUG CRUICKSHANK, PETITIONERS

v.

ROGER ERVAST

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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STATUTES

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INTRODUCTION

A panel of the Eleventh Circuit (the "Panel") has indicated that participants in ERISA plans that hold employer stock are "shareholders" who may sue for additional benefits as such outside of ERISA's exclusive remedial scheme. The reasoning the Panel used to reach this result is contrary to this Court's reasoning in *Aetna Health, Inc. v. Davila*, 2004 WL 1373230 (June 21, 2004). In fact, the Court recently reversed the Eleventh Circuit's ERISA preemption analysis in *Land v. CIGNA Healthcare of Florida*, 339 F.3d 1286 (11th Cir. 2003), *rev'd* 2004 WL 1431955, 72 U.S.L.W. 3310, a case upon which the Panel relied. Because the Eleventh Circuit's ERISA preemption analysis in both cases is contrary to *Davila*, the Court should also grant the petition for certiorari here.

REASONS FOR GRANTING THE PETITION

I. The Court should review this case to determine whether ERISA preempts claims that ERISA participants are "shareholders" by virtue of their participation in ERISA plans that hold stock in trust.

Respondent Roger Ervast ("Ervast") never addresses Petitioners' primary argument for granting certiorari. Ervast's entire argument is predicated upon the assumption that he was a "shareholder" under state law by virtue of his participation in an ERISA plan ("the plan") that held stock in trust for his benefit. However, this is precisely the question that the Court should grant certiorari to determine.

According to Ervast, the only issue is whether ERISA preempts a shareholder's claim "simply because the minority shareholder acquired his stock ownership interest through an ERISA plan?" (Respondent's Brief in Opposition, p. i.) Yet Ervast does not dispute that, at all times relevant to his claim, his only interest in this stock was in his capacity as an ERISA plan participant. He did not ever receive a distribution in shares from the plan – at which point he might arguably have had an ownership interest apart from his plan participation. Further, as the Panel Opinion correctly recognizes, the shares were held in trust for his benefit, and the trust documents are clear that participants do not acquire any right or interest in plan assets. *Ervast v. Flexible Products Co.*, 346 F.3d 1007, 1009 (3a). Therefore, Ervast's only connection or claim to this stock is his participation in the plan.

This case, thus, squarely presents the highly important federal question of whether ERISA preempts a claim that an ERISA participant is a "shareholder" under state law (with all the attendant legal ramifications) as a result of stock held in trust by the plan for the participant's benefit. This question is particularly important because of the large amount of employer stock that is held in Employee Stock Ownership Plans ("ESOPs") and 401(k) plans that are governed by ERISA. As a number of recent lower court opinions demonstrate, the prevalence of employer stock in such plans has engendered significant recent litigation. *See, e.g., Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090 (9th Cir. 2004); *Lalonde v. Textron, Inc.*, 369 F.3d 1 (1st Cir. 2004). Whether participants in such plans have rights as shareholders under state law, as well as under ERISA, is a significant question of

general application upon which this Court should provide guidance.

II. This case presents the Court with an opportunity to apply and elaborate upon the complete preemption standards announced recently in *Davila* in the context of claims arising from employer securities held by ERISA plans.

Ervast's contention that "*Davila* is fully consistent" with the Panel Opinion is clearly contradicted by a comparison of the two opinions. (Respondent's Brief, p. 19 (citing *Aetna Health, Inc. v. Davila*, 2004 WL 1373230 (June 21, 2004)). For example, the Panel focused intently on the type of claim Ervast brought rather than the type of relief he sought. In this regard, the Opinion states that:

> ... the court evaluating federal question jurisdiction *must parse the elements of the claim* to ascertain whether the claim, and not just the factual scenario, states a claim resonant of recovery under § 1132 [ERISA § 502]. In *Land*, we recognized our past precedent indicating that § 1132(a)(1)(B) claims "essentially are contract claims."

Ervast, 346 F.3d at 1014 (11a) (citations omitted) (emphasis added). The Panel then noted Ervast's claim was for breach of fiduciary duty, and concluded that this claim was not "akin" to a claim under § 1132(a)(1)(B) because Ervast claimed no right under the terms of the plan. *Id.* (12a-13a). However, in

Davila, this Court observed that Congress' intent to make ERISA's civil enforcement mechanism exclusive would be undermined "if state causes of action that supplement the ERISA § 502(a) remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim." *Davila*, 2004 WL 1373230 at * 10.

The focus is, thus, not on the similarity of the elements of a state law cause of action to the elements of a § 502(a) claim, as the Panel assumed, but rather on whether the state law claim "duplicates, supplements, or supplants" ERISA's exclusive remedies. *Davila*, 2004 WL 1373230 at * 6. As a result, a participant may not evade ERISA's exclusive remedies by simply basing a claim for additional benefits on a state law theory with no analogue in ERISA. Yet this is precisely what the Panel permitted Ervast to do. By casting his claim as a state law shareholder claim, he masks the fact that the *remedy* he seeks is a larger distribution of benefits from the plan. In this manner, the Panel Opinion opens the door to participants to supplement ERISA's exclusive remedies by basing claims on alleged rights as shareholders rather than on the terms of plans that hold shares in trust for participants.

However *Davila* also instructs that state law claims that require reference to a plan in order to establish liability are not independent of the plan or ERISA, even if the claim is allegedly based on a legal duty independent of the plan. In *Davila*, the Second Circuit concluded that a claim under the Texas Health Care Liability Act ("THCLA") was not preempted, in part, because it found the "wording" of the plan was

immaterial to plaintiffs' claims because the claims invoked an external duty of care (just as Ervast's claim allegedly invokes a duty to shareholders that is external to the plan). *Davila*, 2004 WL 1373230 at * 9 (citing 307 F.3d at 309). This Court disagreed, finding that the wording of the plan was significant because liability would not exist if the treatment that had been denied was, in fact, not covered. *Id.* Thus, the Court found the claim did not arise independently of ERISA or the plan, despite the fact that the plaintiffs were purporting to base their claims on a legal duty independent of ERISA or the plan terms.

In this regard, the Second Circuit's argument is very similar to the Panel's reasoning. The Panel found Ervast was not claiming an entitlement to disclosure under the terms of the plan. Yet the terms of the Plan are still a necessary element to establish liability. Ervast would have no right to the stock at issue without the plan. The put option Ervast alleges he would have delayed exercising is part of the plan, and the plan would have to be interpreted to determine if Ervast had a right to delay the exercise of this right as he contends. More fundamentally, the trust document explicitly states that participants have no rights to assets held in trust. *Ervast*, 346 F.3d at 1009-10. Thus, whether Ervast has shareholder rights as a result of shares held in trust is a threshold issue that requires construction of the ERISA plan documents. As in *Davila*, therefore, his claim is not independent of the plan, despite the fact that he does not claim that he is owed additional benefits under the plan as written.

The Court should grant the petition to determine whether the Panel's reasoning is inconsistent with

Davila, or if *Davila* should be elaborated upon to make explicit that claims based on stock held by an ERISA plan do not arise independently of ERISA or the plan.

III. The Eleventh Circuit's opinion in *Land* does not stand for the proposition for which it is cited by Ervast, and actually suggests that this case, like *Land*, be remanded to the Eleventh Circuit for reconsideration in light of *Davila*.

Ervast cites *Land v. CIGNA Healthcare of Florida*, 339 F.3d 1286 (11th Cir. 2003), *rev'd* 2004 WL 1431955, 72 U.S.L.W. 3310, for the proposition that the Eleventh Circuit does not limit its complete preemption analysis to a comparison of state law claims to ERISA § 502(a)(1)(B) claims. (Respondent's Brief in Opposition, p. 19.) Contrary to Ervast's representations, however, in *Land* the Eleventh Circuit did not consider whether the state law claim at issue was sufficiently analogous to a § 502(a)(2) claim to trigger complete preemption, but rather, like the Ervast Panel, limited its analysis to § 502(a)(1)(B). *Land*, 339 F.3d at 1290. In fact, the only reference to § 502(a)(2) in the opinion is a description of this Court's opinion in *Pegram v. Herdrich*, 530 U.S. 164 (2000), which held that mixed eligibility and treatment decisions are not fiduciary decisions subject to suit under § 502(a)(2). The *Land* court then assumed that if mixed treatment and eligibility decisions are not subject to § 502(a)(2), they must also not be completely preempted under § 502(a)(1)(B).

Like the Ervast Panel, the *Land* court concluded that the claims at issue were not preempted because they were not claims for benefits under the terms of the

plan, but rather were "tort claims based upon the duty of care rather than contract claims based solely upon a denial of benefits." *Land*, 339 F.3d at 1293. The Ervast Panel followed *Land* in concluding that Ervast's claims were not completely preempted because they were not in the nature of contract claims under § 502(a)(1)(B). *Ervast*, 346 F.3d at 1015 (10a-12a) ("This conclusion exposes the preexisting error by the district court – Ervast's claim does not contest his distribution under the terms of the ESOP. Instead, he claims a right to information that, if he possessed, would have changed his decision making process with regard to the time he sought to collect his benefits.").

Of course, this reasoning was rejected in *Davila*, and, in fact, this Court recently reversed *Land* and remanded to the Eleventh Circuit for reconsideration in light of *Davila*. *Land v. CIGNA Healthcare of Florida*, 2004 WL 1431955, 72 U.S.L.W. 3310. Because of the similar reasoning used by the Eleventh Circuit in both *Land* and this case, the Court should also remand this case for reconsideration in light of *Davila* as well as any further complete preemption opinion the Eleventh Circuit announces on reconsideration in *Land*.

IV. This case properly presents the important federal question of whether there is an affirmative fiduciary disclosure obligation under ERISA.

Ervast argues that the question of whether ERISA imposes fiduciary disclosure requirements in the context of employer securities is not properly before this Court. (Respondent's Brief in Opposition, p. 17.) However, an analysis of the remedies available

under ERISA in this context is appropriate in order to determine whether the remedy Ervast seeks "duplicates, supplements, or supplants" ERISA's exclusive remedial scheme. *Davila*, 2004 WL 1373230 at * 6. Indeed, the Court in *Davila* analyzed whether the claim at issue there could have been brought under ERISA, at some point in time, as part of its complete preemption analysis. *Id.* Moreover, the district court here directly addressed this issue in its summary judgment ruling, which the Panel reversed. (30a-36a.)

As discussed more fully in the original petition, since this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), a split of authority has developed on two important questions concerning disclosure obligations under ERISA. A split has developed on the question of whether there is an affirmative fiduciary disclosure obligation at all under ERISA. *See Varity*, 516 U.S. at 506 (declining to "reach the question whether ERISA fiduciaries have a fiduciary duty to disclose truthful information on their own initiative...."); *Ehlmann v. Kaiser Foundation Health Plan of Texas*, 198 F.3d 552, 555 (5th Cir. 2000) (ERISA disclosure obligations limited to statutory list); *Bins v. Exxon Co.*, 220 F.3d 1042 (9th Cir. 2000) (recognizing fiduciary disclosure obligations). A split has also developed on the issue of whether the fact that a plan holds employer securities establishes a sufficient connection to benefits to subject statements or omissions about the sponsor's business to fiduciary scrutiny. *See, e.g., In re Enron Corp. Securities Derivative & ERISA Lit.*, 284 F.Supp.2d 511, 562, 657 (S.D. Tex. 2003) (finding an ERISA duty to disclose information about the sponsor's business); *In re Worldcom ERISA Litigation*, 263 F.Supp.2d 745, 766-

67 (S.D.N.Y. 2003) (same); *Stein v. Smith*, 270 F.Supp.2d 157, 173-74 (D. Mass. 2003) (failing to "fully inform" employees of material facts fiduciary CEO knew or should have known may state a claim for breach of fiduciary duty).

If a viable § 502(a) claim can be based on omissions about the sponsor's business relevant to a participant's decision to hold or sell company stock, certainly Ervast's claim that Defendants should have informed him about Flexible's merger discussions so that he could decide whether to keep or cash out his ESOP stock is "within the scope" of § 502(a). The Court should grant the petition to shed light on these controversial issues.

V. Ervast's argument that the Panel's rationale is not subject to review is without merit.

The overriding error that pervades the Panel Opinion is the assumption that only claims that are closely analogous to claims for benefits under the terms of a plan are preempted. In this regard, the Panel Opinion states: "Ervast's claim is not addressing whether he received what money he was entitled to under the ESOP, but rather whether he was entitled as a minority shareholder to the information Flexible, as the majority shareholder, possessed." *Ervast*, 346 F.3d at 1016 (13a). The Panel Opinion summarizes its holding by stating that the complete preemption doctrine was inapplicable "because the claim that Ervast brought against the defendants is not an ERISA civil action for the recovery of benefits due under the terms of the plan, but grounded in state law." *Id.* at 1016. These legal conclusions, as discussed more

fully in Petitioners' original brief, present important federal questions upon which this Court's guidance is necessary to provide consistency in the standards for determining complete preemption.

Ervast, however, argues that none of these conclusions, viewed in isolation, are determinative of the Panel's holding, and therefore each constitutes dicta. (Respondent's Brief in Opposition, pp. 8-16.) On the contrary, however, these legal conclusions, both individually and collectively, are the heart of the Panel's holding and are intimately intertwined with the central issue the Panel addressed, i.e., whether Ervast's claim is within the scope of ERISA § 502(a). As a result, the Panel's reasons for finding complete preemption inapplicable are properly subject to this Court's review, and present important federal questions upon which this Court's guidance is necessary to maintain consistency in the law.

VI. Ervast's claims of waiver are without merit.

Ervast makes two waiver claims that are not supported by the record. First, he argues that Petitioners did not argue that the Eleventh Circuit should consider aspects of ERISA § 502(a) other than subsection 502(a)(1)(B) to determine whether Ervast's claim falls "within the scope" of § 502(a). (Respondent's Brief in Opposition, p. 14.) This is simply not the case. Petitioners' response brief raises the issue of preemption under § 502(a) generally. Moreover, in their supplemental brief, Petitioners argued: "Similar remedies potentially available to Plaintiff include a claim for restitution from any breaching fiduciaries, equitable reinstatement of Plaintiff's put option and/or

the ESOP, and (whether alone or in combination with equitable remedies) a claim for benefits under § 502(a)(1)(B)." (Appellees' Supplemental Brief, p. 5.) Further, the district court addressed in detail the merits of Ervast's claim under § 502(a)(3). (30a-36a.) Therefore, the issue of whether the Eleventh Circuit erred by restricting its complete preemption analysis to a consideration of the similarity of Ervast's claim to a § 502(a)(1)(B) claim is properly before the Court.

Second, Ervast contends that Petitioners are challenging the preemption standard applied by the Eleventh Circuit in *Butero v. Royal Maccabees Life Insurance Co.*, 174 F.3d 1207 (11th Cir. 1999), and that this challenge was not made below. (Respondent's Brief in Opposition, p. 9.) This argument, however, is premised on an inaccurate characterization of Petitioners' position. Petitioners are not challenging *Butero* itself but rather the Panel's application of *Butero* to require a similarity between the elements of a state law claim and the elements of an ERISA § 502(a) claim as a condition precedent to a finding of complete preemption. It was not apparent until after the Opinion that the Panel was interpreting the *Butero* "akin to" standard to mean that a court must "parse the elements" of a state law claim and determine that such elements are sufficiently analogous to the elements of a § 502(a) claim in order to find the state law claim completely preempted. Ervast, 346 F.3d at 1014 (11a). Whether the Eleventh Circuit erred in this regard is an issue properly before this Court.

CONCLUSION

The Court should grant the petition to determine whether ERISA participants are shareholders with respect to shares held by ERISA plans. This is particularly true in light of the inconsistency between the Panel's reasoning and this Court's opinion in *Davila*.

Respectfully submitted,

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